PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA,	)	
Complainant,	)	
v.	)	**Proceeding No.: 19-119**
	)	**Bureau ID No.: EB-19-MD-002**
ALABAMA POWER COMPANY,	)	
Defendant.	)	

ALABAMA POWER COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES TO AT&T'S POLE ATTACHMENT COMPLAINT

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June 21, 2019

I. EXECUTIVE SUMMARY

- The fundamental flaw in AT&T's complaint is the baseless assertion that AT&T occupies the same one-foot of pole space as Alabama Power's CATV and CLEC licensees. This assertion is not merely incorrect. It is spectacularly wrong. The joint use agreement allocates [redacted] feet of space to AT&T's "exclusive use" and allows AT&T to occupy additional space without additional payment. AT&T, it appears, is taking full opportunity of this contractual right. **On average, AT&T is occupying [redacted] feet of space on Alabama Power's poles**.

- In addition to this [redacted] feet of space that AT&T physically occupies, AT&T is also the cost-causer of an additional 3.33 feet of safety space on joint use poles owned by Alabama Power. **Alabama Power does not need safety space on its own poles**. Unless the cost of this space is either shared pursuant to the terms of the joint use agreement or allocated to AT&T, it will result in electric ratepayers bearing the cost of pole space that has nothing to do with the provision of electric service. If AT&T was paying for [redacted] feet of space in the same way that a CATV or CLEC licensee would pay for space on Alabama Power's poles, AT&T would be paying an annual rate in excess of $[redacted] per pole—an amount that far exceeds AT&T's actual joint use rental rate.

- Unlike Alabama Power's CATV and CLEC licensee, AT&T did not pay make-ready for access to Alabama Power's poles. **Alabama Power built a network of 40-foot poles specifically to accommodate AT&T.** This not only saved AT&T more than $[redacted] dollars in make-ready costs, permitting fees and inspection costs, but Alabama Power also is indefinitely burdened with the carrying cost of a network of poles that is taller, stronger and more expensive than necessary for its own service requirements. **Alabama Power's carrying cost of joint use poles is $[redacted]/pole higher than the carrying cost of non-joint use poles**. AT&T's per pole cost contribution under the joint use agreement does not even cover this incremental cost to Alabama Power.

- AT&T's complaint also alleges, in strikingly cavalier fashion, that it enjoys no net advantages under the joint use agreement as compared to Alabama Power's CATV and CLEC licensees. AT&T makes no effort to quantify the net advantages, but instead relies upon the false premise that because the benefits of the joint use agreement are reciprocal, they cancel each other out. Even assuming this was conceptually true, it ignores a huge mathematic fact: **AT&T reaps the benefit of being the licensee on 630,000 jointly used poles; Alabama Power only reaps the benefit of being the licensee on 179,000 joint use poles**. In other words, AT&T enjoys a 451,000 pole advantage over Alabama Power when it comes to the "reciprocal" benefits of being the licensee under the joint use agreement. Perhaps more telling is that, despite AT&T's efforts to trivialize the value of these advantages, AT&T was unwilling to relinquish any of them in the pre-complaint discussions between the parties.

- Though the joint use agreement provides numerous benefits to AT&T, none is greater than the contractual right to remain attached to Alabama Power's poles even in the event of termination. AT&T, in essence, has a unilateral option on a perpetual license to remain attached to 630,000 Alabama Power poles. Under the joint use agreement, Alabama Power cannot evict AT&T. AT&T, on the other hand, can choose at any time to remove its facilities from Alabama Power's poles. AT&T has a choice. Alabama Power does not. As set forth in the testimony of Mr. Kenneth Metcalfe, CPA, CVA, **this unilateral option on a perpetual license provides a net benefit to AT&T of $[redacted] ($[redacted] per pole) on an annualized basis**—an amount that far exceeds AT&T's actual joint use rental rate.

- AT&T's complaint also recycles the contrived argument that the infrastructure cost-sharing arrangement set forth in the joint use agreement (which AT&T incorrectly characterizes as "pole attachment rates") is somehow the product of unfair bargaining leverage. AT&T makes this claim (1) without a shred of evidence, (2) notwithstanding the fact that the joint use network cost allocation has remain unchanged since 1978, and (3) despite that the fact that **the cost-sharing methodology in the joint use agreement falls squarely within what AT&T's own internal documents described as the "most equitable" means of cost allocation**.

- **AT&T never engaged in good faith discussions regarding the joint use agreement**. AT&T merely insisted at all times on retaining the benefits of the joint use agreement, but at the per pole rate a CLEC would pay for one-foot of occupancy. AT&T took this position despite its unambiguous statement that it was "not a CLEC" and did not want to be treated as one. AT&T's only settlement proposal demanded a massive refund for alleged overpayments spanning many years, even though AT&T never raised an objection to the cost-sharing provision of the joint use agreement until March 7, 2018, and even though AT&T made no effort to demonstrate that it was "similarly situated" to Alabama Power's CATV and CLEC licensees. To make matters worse, AT&T actually served its complaint while Alabama Power was awaiting a response to several issues raised in an April 3, 2019 telephone call between Pam Boyd (Alabama Power) and Dianne Miller (AT&T).

- **AT&T's claims against Alabama Power—bereft of factual and legal support as they are—also are subject to a mandatory arbitration provision**. The joint use agreement provides that "any differences of opinion as to the intent of the agreement…and any differences which are not covered by the terms hereof…shall be submitted to arbitration." This dispute unquestionably falls within the scope of the arbitration provision.

- For all of the reasons set forth above, and for all of the reasons set forth herein, the Commission should deny AT&T's complaint. At a minimum, the Commission should stay this proceeding pending mandatory arbitration of the issues raised in AT&T's complaint.

TABLE OF CONTENTS

II. PARTIES AND JURISDICTION

1. Alabama Power admits that AT&T is the ILEC for the vast majority of the state of Alabama. Alabama Power further admits that AT&T provides telecommunications services, and that it has used its power of incumbency throughout the state of Alabama to offer numerous other services. On information and belief, Alabama Power admits that AT&T is a Georgia limited liability company with its principal place of business at the address stated in the second sentence of paragraph 1. Alabama Power denies any remaining allegations within paragraph 1.

2. Alabama Power admits that it is the second largest electric utility operating company owned by Southern Company and that it owns poles in Alabama that are used for wire communications, but denies any remaining allegations in the first sentence of paragraph 2. Alabama Power admits the allegations in the second and third sentences of paragraph 2. Alabama Power provides electric service to 1.4 million customers throughout its service area.[1] Alabama Power's service area includes most of the population centers within the lower two-thirds of the state (including Mobile, Montgomery, Tuscaloosa, Birmingham, Anniston, Gadsden and Auburn) and also includes many rural and agricultural parts of the state.[2] Alabama Power's service area does not include the northernmost part of the state, including Huntsville, Decatur, Florence or Ft. Payne.[3]

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[1] *See* Ex. A at APC000028 (Declaration of Pamela O. Boyd, June 20, 2019 ("Boyd Declaration") ¶ 5).

[2] *See* Ex. A at APC000028, -40 (Boyd Declaration ¶ 5; Ex. A-1 (Map of Alabama Power Company Service Territory)).

[3] *See* Ex. A at APC000028 (Boyd Declaration ¶ 5).

3. Alabama Power admits: (1) that Alabama Power and AT&T are parties to a joint use agreement dated June 1, 1978; and (2) that the joint use network cost sharing provisions of the 1978 joint use agreement were last amended in or around 1994. The first time AT&T requested renegotiation of the 1994 amendment to the cost sharing provisions—or even suggested that those cost-sharing provisions were unjust, unreasonable, unfair or inequitable—was March 7, 2018. Alabama Power further admits (1) that the jointly used network currently consists of approximately 809,000 poles in the overlapping areas served by Alabama Power and AT&T, (2) that Alabama Power owns approximately 630,000 of those poles (78%), and (3) that AT&T owns approximately 179,000 (22%) of those poles.[4] AT&T owns approximately 414,000 poles throughout the state of Alabama, which includes the 179,000 poles that it owns in the jointly used network with Alabama Power.[5] Upon information and belief, AT&T is the ILEC in most of Alabama Power's service area, with the exception of the westernmost part of the state and the southeasternmost part of the state.[6] Upon information and belief, AT&T is also the ILEC for most of north Alabama (including Huntsville and Florence).[7]

4. Alabama Power denies that the Commission has jurisdiction over this dispute for three independent reasons: (1) the 1978 joint use agreement, as AT&T acknowledges, contains a

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[4] These numbers are "approximate" because AT&T has rejected repeated requests by Alabama Power since 2008 to conduct a joint audit. *See* Ex. C at APC000081 (Declaration of Sherri T. Morgan, June 20, 2019 ("Morgan Declaration") ¶ 16). The approximate number of poles is based on a projection methodology proposed by AT&T in September 2005, shortly after the last joint audit between the parties. *See* Ex. C at APC000081 (Morgan Declaration ¶ 15).

[5] *See* AT&T ARMIS Report, CC Docket 86-182 (April 1, 2019).

[6] *See* Ex. 8 at APC000464 (ILEC Service Area Map).

[7] *See* Ex. 8 at APC000464 (ILEC Service Area Map).

mandatory arbitration provision which, on its face, requires that this dispute be submitted to arbitration;[8] (2) the Alabama Public Service Commission has, or may, have jurisdiction over this dispute;[9] and (3) AT&T has not met the conditions precedent of good-faith negotiations prior to filing this complaint.[10]

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[8] AT&T avers in its complaint that the arbitration clause "is limited to disputes about the 'intent of the Agreement' and 'differences which are covered by [its] terms.'" AT&T's Pole Attachment Complaint, at ¶ 4 n.6). Actually, **the arbitration provision says the exact opposite of what AT&T alleges**. The mandatory arbitration provision says: "Any differences of opinion…of the parties as to the intent of the Agreement and any differences which are not covered by the terms hereof…shall be submitted to arbitration…." *See* Ex. 1 at APC000309 (JUA, Art. XVIII). This misstatement of fact within the opening allegations of the complaint is a harbinger of things to come within AT&T's complaint. In any event, this dispute is undoubtedly within the scope of the arbitration provision. AT&T's complaint should be dismissed or stayed given that the issues raised by AT&T are subject to a mandatory arbitration provision.

In *Frontier Communications of the Carolinas LLC v. Duke Energy Carolinas*, LLC, EB-14-MD-001; Docket No. 14-214, the Enforcement Bureau stayed an ILEC's pole attachment complaint against an electric utility under very similar circumstances, noting:

> The Federal Arbitration Act (FAA) states that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court has stressed that, under this section of the FAA, arbitration provisions must be enforced "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional demand." Further, the "mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."

FCC Letter-Ruling, File No. EB-14-MD-001; Docket No. 14-214 (filed March 16, 2015) at p.2 (internal citations omitted).

[9] *See e.g.*, Ala. Code § 37-1-32 ("The Public Service Commission shall have general supervision of all persons, firms and corporations operating utilities . . . It shall examine such utilities as often as may be necessary to keep informed as to their general condition, their franchises, capitalization, rates and other charges, **and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted and operated**. . . .") (emphasis added).

[10] *See e.g.*, ¶¶ 32-35, *infra*.; 47 C.F.R. § 1.722(g).

5. Alabama Power admits that the state of Alabama has not "certified" pole attachment jurisdiction in the conventional sense, but denies that this lack of "certification" necessarily means the state of Alabama lacks jurisdiction over this particular dispute. The admission set forth above is made without prejudice towards Alabama Power's right to seek the intervention of the Alabama Public Service Commission, if necessary, to avoid a massive shift of the cost of the jointly used network to Alabama Power's electric customers. In any event, the dispute between the parties involves at least four "buckets" of substantive issues: (1) the rates AT&T pays for access to Alabama Power's poles; (2) the rates Alabama Power pays for access to AT&T's poles; (3) AT&T's access rights to Alabama Power's poles; and (4) Alabama Power's access rights to AT&T's poles. At most, the Commission's jurisdiction extends only to the first of these four issues, which counsels even further in favor of arbitration in this case. Alabama Power denies any remaining allegations in paragraph 5.

6. Alabama Power admits that there is no other action between the parties currently pending in the Commission or any court or other government agency based on the same set of facts. Alabama Power denies that AT&T's complaint does not overlap with any issue in a notice-and-comment rulemaking proceeding that is currently before the Commission. The Commission is currently considering a petition for reconsideration which raises, among other issues, the legality of the very rule upon which a portion of AT&T's complaint is based.[11] The comment cycle in the above-referenced proceeding closed on November 19, 2018 and the Commission has not yet

[11] Petition for Reconsideration of the Coalition of Concerned Utilities, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

reached a decision. Further, the order adopting the rule upon which AT&T's complaint is based is currently under review in the Ninth Circuit Court of Appeals.[12]

7. Alabama Power admits that the parties engaged in written communications regarding certain matters raised in AT&T's complaint and further admits that the parties held two face-to-face meetings regarding certain matters raised in AT&T's complaint, but Alabama Power denies any remaining allegations in paragraph 7 and specifically denies, as set forth in more detail in part III.B.2-4 below, that AT&T's participation in these communications was in good faith. Notwithstanding the fact that Alabama Power offered an approximately $[redacted] reduction in AT&T's annual cost-sharing obligation (based on the Commission's old telecom rate formula)—without further revision of any other term in the joint use agreement—AT&T's only proposal during the entire negotiation involved a $[redacted] refund and a going-forward rate calculated using the Commission's new telecom rate formula based on one-foot of pole space occupied, while retaining all of its advantages under the joint use agreement. As set forth more fully herein, the space actually occupied on Alabama Power poles in in excess of [redacted] feet—even without allocating any of the safety space to AT&T.

Moreover, at the time AT&T served its complaint, Alabama Power was waiting to hear back from AT&T regarding the substance of an April 3, 2019 conversation between Pam Boyd (Alabama Power, Power Deliver Technical Services General Manager) and Dianne Miller (AT&T, Director—Construction & Engineering).[13] From Alabama Power's perspective, AT&T never negotiated in good faith. AT&T was simply expecting for Alabama Power to capitulate to its

[12] *American Elec. Power Serv. Corp., et al. v. FCC*, In the United States Court of Appeals for the Ninth Circuit, Case No. 19-70490.

[13] Ex. A at APC000037 (Boyd Declaration ¶ 30).

unlawful and incomplete demands. If what AT&T has done, here, meets the Commission's good faith negotiation requirements, then those requirements have no meaning at all.

III. THE JOINT USE AGREEMENT PROVIDES NET VALUE TO AT&T THAT FAR EXCEEDS AT&T'S NET PAYMENTS UNDER THE AGREEMENT.

8. Alabama Power denies that AT&T "attaches to Alabama Power's poles on terms and conditions that are materially comparable to those of a telecommunications carrier or a cable operator." AT&T attaches to Alabama Power's poles on terms and conditions that materially advantage AT&T over its CATV and CLEC competitors. Chief among those material advantages are: (1) Alabama Power has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate AT&T without any upfront capital cost to AT&T; and (2) Alabama Power has contractually agreed that, even in the event of a termination, AT&T can remain attached to Alabama Power's poles. Further, AT&T occupies pole space in a qualitatively and quantitatively different way than Alabama Power's CATV and CLEC licensees.[14] AT&T does not occupy one-foot of space like Alabama Power's CATV and CLEC licensees. AT&T is allocated [redacted] feet of space in the joint use agreement and, as set forth below, AT&T is actually occupying [redacted] feet of space on average.

Alabama Power also denies that it "continues to charge AT&T pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers." First, Alabama Power does not charge AT&T "pole attachment rates" at all. The parties operate under a joint use agreement which contains a specific formula for determining how

[14] *See* Ex. E at APC000151-55 (Declaration of Wilfred Arnett, June 19, 2019 ("Arnett Declaration"), pp. 4-8).

the costs of the jointly used network are shared.[15] Second, to the extent the cost-sharing provisions of the joint use agreement can be considered "pole attachment rates" (which they are not), the cost-sharing provisions in the joint use agreement are, in fact, comparable to Alabama Power's other incumbent local exchange carrier joint users.[16] Third, even if the new telecom rate applied here (which it does not given the circumstances), it should be applied on a per foot basis to avoid discriminatory effect on CATV licensees. **<u>If the new telecom rate is applied on a per foot basis, the net effect would involve AT&T paying more—not less—to Alabama Power.</u>**[17]

9. Alabama Power admits that the Commission revised its ILEC complaint rule in 2018 to create two rebuttable presumptions applicable to "pole attachment contracts entered into or renewed after [March 11, 2019]": (1) that an ILEC is similarly situated to CATV and non-ILEC telecom carriers; and (2) that an ILEC may be charged a rate no higher than a rate determined in accordance with the Commission's telecom rate formula.[18] Alabama Power denies that its joint use agreement with AT&T is either a "pole attachment contract" or that it was "entered into or renewed after [March 11, 2019]." The joint use agreement has an effective date of June 1, 1978, and Appendix B (which contains the current joint use network cost sharing methodology) was last revised with an effective date of January 1, 1994. Neither party has terminated the agreement, and

[15] *See* Ex. 1 at APC000316-17 (JUA, App'x B).

[16] *See* Alabama Power's Response to AT&T First Set of Interrogatories, dated May 22, 2019, at Ex. 1-2.

[17] *See* ¶ 12, *infra*.

[18] Alabama Power believes that the new ILEC complaint rule is arbitrary, capricious and inconsistent with the law. Though Alabama Power does not seek to litigate that issue here, Alabama Power specifically reserves its right to seek appellate review of the rule on an as-applied basis, if necessary.

neither party requested renegotiation of Appendix B at any time prior to March 7, 2018.[19] Alabama Power denies any remaining allegations in the first sentence of paragraph 9. With respect to the second sentence in paragraph 9, Alabama Power denies that it "offered no valid basis to rebut that presumption, only a series of makeweight arguments about claimed advantages that do not in fact exist." To the contrary, Alabama Power offered numerous valid reasons to retain the existing cost-sharing relationship. But AT&T had determined, prior to any conversations with Alabama Power, that it would not entertain any legitimate conversation about the value of those advantages.

Furthermore, what AT&T dismisses as "makeweight arguments about the claimed advantages" of the joint use agreement are specific provisions of the joint use agreement that Alabama Power asked AT&T if it wanted to retain. In Alabama Power's response to AT&T's initial March 7, 2018 demand and request for meeting, Alabama Power asked: "what issues or other areas of the relationship (other than rental rates) AT&T would like to discuss."[20] In response, AT&T said that it wanted "to focus solely on pole attachment rental rates."[21] In the lead-up to the February 22, 2019 meeting, Alabama Power again asked AT&T "what portions of the joint use agreement (other than the Appendix B annual rate methodology) that AT&T wants to change, if any" and to identify the "portions of the joint use agreement in which AT&T sees no going-forward

[19] It is a stretch to say that AT&T requested renegotiation of Appendix B on March 7, 2018 because AT&T never framed it as such. Instead, AT&T merely framed its requests (more like demands) based on its own understanding of the Commission's rules and its own self-serving evaluation of the economics of the joint use agreement. In fact, AT&T's initial demand—like much of its subsequent correspondence—pretends as if Appendix B does not exist.

[20] Ex. 10 at APC000469 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (April 4, 2018)) ("Alabama Power April 4, 2018 Letter").

[21] Ex. 11 at APC000471 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (April 13, 2018)) ("AT&T April 13, 2018 Letter").

value (for example, does AT&T see value in the [redacted] feet of allocated space, the ability to use space in excess of the allocated space, the per pole vs. per attachment billing methodology, etc.)"[22] In response, AT&T said that it did not "wish to complicate our negotiations by talking about *changes* to the existing agreement."[23] At the February 22, 2019 meeting, Alabama Power asked AT&T why it was so reluctant to discuss any changes in the operating relationship to bring AT&T more in line with Alabama Power's CATV and CLEC licenses.[24] AT&T said it was because "we are not a CLEC" and that AT&T did not want an agreement like that.[25] In other words, those "makeweight" advantages that AT&T contends have no value were things that AT&T would not even discuss removing from the agreement. Alabama Power denies any remaining allegations in paragraph 9.

A. AT&T is not entitled to the new telecom rate because it is not similarly situated to the other attaching entities that pay the new telecom rate.

10. Alabama Power admits that, under the Commission's rules, similarly situated attachers should pay similar pole attachment rates for comparable access, but denies that AT&T is similarly situated to the attaching entities who pay the new telecom rate. Among other things: (1) AT&T occupies far more space; (2) AT&T gained access through a built-to-suit network, rather than expensive make-ready; and (3) AT&T enjoys an indefinite contractual right to remain attached to Alabama Power's poles even in the event of a termination (in other words, AT&T does

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[22] Ex. 17 at APC000493 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 6, 2019) ("Alabama Power Feb. 6, 2019 Email").

[23] Ex. 18 at APC000496 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 8, 2019)) ("AT&T Feb. 8, 2019 Email") (emphasis in original).

[24] Ex. A at APC000035-36 (Boyd Declaration ¶ 26).

[25] Ex. A at APC000036 (Boyd Declaration ¶ 26).

not bear any contractual risk of displacement unlike other attaching entities). Alabama Power further denies that "AT&T is entitled to rate relief in this case."

As Alabama Power stressed to AT&T during the fruitless discussions preceding this complaint, the "rate" formulas set forth in Appendix B to the joint use agreement are merely a proxy for pole ownership. If each party owned its contractual share of the joint use network, neither party would make a net annual payment to the other. More specifically, if AT&T owned [redacted]% of the poles in the joint use network and Alabama Power owned [redacted]% of the poles in the joint use network, neither party would make a meaningful net annual payment to the other.[26] This arrangement is economically no different than a provision that requires each of the parties to buy their way back into parity (to ensure each party is carrying its contractual share of the annual ownership costs of the joint use pole network). Under these circumstances, AT&T could not complain about the need for "rate relief" because its actual concern would be with the share of the joint use network it was contractually required to carry. The Commission should not engage in blue-penciling the joint use agreement here simply because AT&T enjoys the contractual **<u>benefit</u>** of not being **<u>required</u>** to maintain ownership of [redacted]% of the jointly used network. Under AT&T's postulation of how the Commission's rules should work, this contractual benefit to AT&T (i.e. not being required to buy its way back into parity) would entitle AT&T to "rate relief" when the benefit

[26] There might be de minimis payments by one party to the other under this scenario given the minor differences in the average embedded pole cost between the parties. For example, AT&T's average embedded pole cost under Appendix B based on year ending 2017 data was $[redacted]; Alabama Power's was $[redacted]. This would mean that, even at [redacted]%/[redacted]% ownership, AT&T would still have paid Alabama Power $[redacted] in annual joint use rental. The average embedded pole cost, as calculated under the Appendix B, is a gross figure rather than a net figure (it does not deduct accumulated depreciation as is the case with the Commission's formulas). AT&T's pole cost would be significantly lower than Alabama Power's pole cost if the parties used net figures, due to the highly depreciated nature of AT&T's pole plant as well as AT&T's failure to invest in new pole plant.

should, instead, be a basis for upholding the bargain. If this is the way the Commission's rule reads, then the Commission should forbear from applying its rule in this situation in order to avoid a grossly inequitable result.[27]

1. The new telecom rate presumption does not apply but even if it did, it would warrant a rate in excess of the current rate under the joint use agreement.

11. Alabama Power denies that its joint use agreement with AT&T is a "newly-renewed" agreement as defined in the Third Report and Order. The initial term of the joint use agreement expired on June 1, 1988. Following June 1, 1988, the joint use agreement "shall continue thereafter until terminated, insofar as the right to attach to additional joint use poles is concerned, by either party giving the other party one (1) year's notice in writing of intention to terminate the right of both parties to attach to additional joint use poles."[28] Thus, the joint use agreement at issue here "renewed" if at all in 1988, subject to either party's right to terminate (which neither has exercised). More importantly, though, the joint use agreement makes clear that a "termination of the right to attach to additional joint use poles shall not abrogate or terminate the

[27] *See* 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."); *see also*, 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.")

[28] Ex. 1 at APC000308-09 (JUA, Art. XV).

right of either party to attach to existing joint use poles or to maintain existing attachments…."[29] In other words, **<u>as it relates to existing joint use poles, the joint use agreement cannot be "renewed" because there is no corresponding right of termination</u>**. Similarly, with respect to existing joint use poles, the joint use agreement cannot be in "evergreen" status because an "evergreen" contract is one that "does not renew, but continues until such time as one party takes affirmative action to terminate it."[30] To put it more specifically, Alabama Power is stuck with AT&T on roughly 630,000 poles unless and until AT&T decides that it wants to remove its facilities. AT&T, on the other hand, can remove its facilities from any or all of those 630,000 poles whenever it chooses and it will no longer be required to pay a "rate" with respect to such

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[29] *Id.*

[30] *Bentley Systems, Inc. et al v. Intergraph Corp.*, 922 So. 2d 61, 75-76 (Ala. 2005); *see also Trs. of the B.A.C. Local 32 Ins. Fund v. Fantin Enters.*, 163 F.3d 965, 968-69 (6th Cir. 1998) (equating "evergreen clauses" and "renewal clauses" and stating that "via the operation of an evergreen clause, all of the attendant contractual obligations naturally continue for the period of renewal" where the evergreen clause at issue stated: "It is agreed by both parties that this Agreement shall remain in full force and effect through May 27, 1992 and from year to year thereafter unless written notice of intent to terminate or modify the Agreement be submitted, at least sixty (60) days prior to the expiration date by either party to the other."); *Trs. of the Sheet Metal Local #10 v. Genz-Ryan Plumbing & Heating Co.*, No. 08-4752 (RHK/JJK), 2009 U.S. Dist. LEXIS 61358, at *3 (D. Minn. July 17, 2009) (characterizing as an "evergreen clause" a provision in a collective bargaining agreement stating "This Agreement shall become effective on the 1st day of May, 2005, and shall remain in full force and effect until the 30th day of April, 2008, and shall continue in force from year to year thereafter, unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party."); CONTRACT: EVERGREEN CLAUSES: STILL A USEFUL COMMERCIAL CONTRACTING TOOL, BUT NOT WITHOUT PITFALLS, 97 MI Bar Jnl. 22, 23 (Sept. 2018) ("A typical evergreen clause generally provides that the term of an agreement will automatically renew for subsequent periods of the same length unless either party provides written notice of termination to the other party within some minimum period before the current term expires.")

poles.[31] Given this, and under the specific joint use agreement at issue here, the Commission's presumptions cannot, as a matter of law and logic, apply to joint use poles in existence as of the effective date of the new rule. Otherwise, this would be tantamount to forced access at regulated rates—a result that all parties and the Commission agree is inconsistent with the scope of the Pole Attachments Act.[32] As it relates to new joint use poles—in other words poles to which AT&T has not yet gained access under the terms of the existing joint use agreement—Alabama Power does not care to quibble with AT&T over rates, terms and conditions. Alabama Power would be satisfied to allow AT&T to gain access to new poles under rates, terms and conditions identical to Alabama Power's CATV and CLEC attachers (an offer previously extended to AT&T). Alabama Power denies any remaining allegations in paragraph 11.

12. Alabama Power denies that AT&T is entitled to a "rate determined in accordance with § 1.1406(e)(2)" under the law or facts of this case. That said, AT&T's calculation of Alabama Power's one-foot CLEC rates are incorrect. Alabama Power's CATV and CLEC rates, based on

[31] Even though this provision is reciprocal, it is one of the many provisions in the joint use agreement that disproportionately benefits the party owning less than its contractual share of the joint use network.

[32] *See* 47 U.S.C. § 224(f)(1) & (a)(5) (restricting mandatory access to "a cable television systems and any telecommunications carrier" and expressly excluding ILECs form the definition of "telecommunication carrier" for purposes of section 224); *Implementation of Section 224 of the Act*; *A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 202 (2011) ("*2011 Order*") ("incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1)"); Reply Comments of AT&T, Inc., *Implementation of Section 224 of the Act*; *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket 07-245 (filed April 22, 2008), at p. 20 (noting that "the right of access to poles under section 224(f)," is something "which ILECs do not enjoy").

a single attachment occupying one-foot of usable space, for the 2011-17 billing years, are as follows:[33]

	2011	2012	2013	2014	2015	2016	2017
CATV	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
CLEC	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

For The 2018 and 2019 billing years, Alabama Power's CATV and CLEC rates, based on a single attachment occupying one foot of usable space, are as follows:[34]

	2018	2019
CATV	[redacted]	[redacted]
CLEC	[redacted]	[redacted]

AT&T, though, occupies significantly more space on Alabama Power's poles than the CATV and CLEC licenses. For starters, AT&T is allocated [redacted] feet of space under the joint use agreement.[35] The joint use agreement also specifically provides for safety space on Alabama Power's poles, which Alabama Power does not need (and would not have built) for its own service requirements. Field data reveals that **<u>AT&T actually occupies, on average, [redacted] feet of space on Alabama Power's poles (excluding any portion of the safety space)</u>**.[36] On average, AT&T's highest

[33] Ex. B at APC000058 (Declaration of Wesley L. Conwell, Jr., June 20, 2019 ("Conwell Declaration") ¶ 8). The actual billing year for Alabama Power's CATV and CLEC licensees is July 1 through June 30, based on the immediately preceding year's data. For purposes of simplicity, and by way of example, Alabama Power refers to the July 1, 2011 through June 30, 2012 billing year as the 2011 billing year within this answer.

[34] Ex. B at APC000058 (Conwell Declaration ¶ 9).

[35] *See* Ex. 1 at APC000305 (JUA, Art. I(M)(2)).

[36] *See* Ex. C at APC000077-78 (Morgan Declaration ¶ 7). The [redacted] feet calculation does not account for the additional 12 inches of clearance required above AT&T's highest average attachment in order or another communications entity to make an attachment. For this reason, AT&T's actual occupancy might be more fairly stated as [redacted] feet.

attachment on Alabama Power's poles is at [redacted] feet (measured at the pole).[37] On average, the mid-span clearance of AT&T's lowest attachment on Alabama Power's poles is [redacted] feet.[38]

Moreover, on Alabama Power poles, AT&T is the cost causer of the safety space (also known, appropriately, as the "communication worker safety zone") which is typically 40 inches (3.33 feet).[39] Given this, **AT&T is actually or constructively occupying more than [redacted] feet of space on joint use poles owned by Alabama Power**. As referenced above, the new one-foot telecom rate, if it applies at all, should be applied on a per foot basis the same as the CATV rate would be applied (otherwise, the application of the new telecom rate would discriminate against CATVs).[40] Under this scenario, the "rates" actually paid by AT&T to Alabama Power between

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[37] *See* Ex. C at APC000077 (Morgan Declaration ¶ 7).

[38] *See* Ex. C at APC000077 (Morgan Declaration ¶ 7).

[39] Alabama Power does not need the communication workers safety zone without communications attachments on its poles. Given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T—to put this cost on Alabama Power's electric ratepayers would be requiring the electric ratepayers to pay for something that is not necessary (or even useful) in the provision of electric service. *See* Ex. A at APC000030 (Boyd Declaration ¶ 11); Ex. C at APC000078 (Morgan Declaration ¶ 9).

[40] Of the approximately 608,000 non-ILEC attachments on Alabama Power's poles, 574,000 of them (94%) are CATV attachments. *See* Ex. C at 81 (Morgan Declaration ¶ 15). In other words, it is the CATVs—not the CLECs—with whom AT&T is competing in Alabama Power's service area. Further, the entire purpose of the Commission's 2011 and 2015 revisions to the telecom rate was to put non-ILEC telecom carriers on equal footing with CATVs. *See 2011 Order*, ¶ 151 (noting that the new telecom rate formula would "generally recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate" and further noting, "this approach will significantly reduce the marketplace distortions…that rose from different rates"); *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Order on Reconsideration, 30 FCC Rcd 13731, 13738 (2015) ("[The Commission] take[s] this step…to bring cable and telecom rates for pole attachments into parity at the cable-rate level.") To apply the new telecom rate as proposed by AT&T not only would discriminate against CATVs but also would frustrate the Commission's entire purpose for revising the telecom rate.

2011-17 compare to the new telecom rate (multiplied by the number of feet occupied by AT&T) as follows:[41]

	2011	2012	2013	2014	2015	2016	2017
CLEC Rate	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Contract Rate	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Thus, as compared to what a CATV or CLEC would have paid for the same burden on the pole, **AT&T has consistently underpaid Alabama Power**. The fact that AT&T is seeking in this case both a massive refund and millions of dollars of reduction in annual cost-sharing obligations makes its complaint not merely unfounded and short-sighted, but to borrow AT&T's expression, "egregiously so." Alabama Power denies any remaining allegations in paragraph 12.

2. The benefits of the joint use agreement provide AT&T significant material advantages over Alabama Power's CATV and CLEC licensees.

13. Alabama Power admits that the "new telecom rate presumption is rebuttable" but denies the allegation that Alabama Power "cannot meet its burden here." The clear language of the joint use agreement itself rebuts the presumption. But in addition to the clear language of the joint use agreement, the actual data from the field, and the testimony of Alabama Power's witnesses, the analysis of Mr. Wilfred Arnett and the economic evaluation submitted by Mr. Kenneth Metcalfe rebut the presumption in this case. Alabama Power further admits that, with respect to prospective claims following the effective date of Rule 1.1413(b) (and until stayed or overturned by the Commission on reconsideration or a court of appeals on review), the revised

[41] For years 2011-14, the chart uses the one-foot CATV rate because the one-foot CLEC rate was higher than the CATV rate in those years.

rule requires "clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems." The evidence submitted by Alabama Power herewith satisfies this burden.[42]

With respect to the third sentence of paragraph 13, AT&T, once again, has it wrong. In the third sentence of paragraph 13, AT&T cites the 2011 Order for the proposition that "the electric utility must weigh and account for all of the different rights *and responsibilities* placed on the ILEC as compared to its competitors" (emphasis in original) and specifically quotes paragraph 216 n. 654 of the 2011 Order as follows: "A failure to weigh, and account for, the different rights and responsibilities in joint use agreement[s] could lead to marketplace distortions." Alabama Power could not agree more. The Commission's point in this statement, which immediately followed a lengthy acknowledgement of the many benefits to ILECs under joint use agreements, was that simply giving ILECs the telecom rate would give ILECs an unfair advantage over their CATV and CLEC competitors.[43] For this reason, the Commission stated in the very next sentence following the sentence quoted by AT&T: "We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators."[44]

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[42] One issue, among many that AT&T completely glosses over, is that the new presumptions and new burden of proof apply only with respect to AT&T's claim for post-March 11, 2019 relief. No such presumptions exist for the period prior to March 11, 2019 and the burden of proof for that period lies with AT&T.

[43] *2011 Order*, 26 FCC Rcd 5240, 5335 (¶ 216, n.654).

[44] *Id*.

AT&T's allegations in the fourth, fifth, sixth and seventh sentences of paragraph 13 are a desperate attempt to neutralize what AT&T knows is potent proof of the very types of benefits that make the joint use agreement between AT&T and Alabama Power fundamentally different—on an operational and economic level—from Alabama Power's pole license agreements with CATVs and CLECs. AT&T's argument in these four sentences goes something like this: "the costs we avoid paying to Alabama Power under the joint use agreement are costs we bear internally" and "any terms in the joint use agreement which are reciprocal cancel each other out and therefore cannot form the basis of a net benefit to either party."

With respect to the first part of the argument, AT&T misses two important points. First, the first part of the argument incorrectly assumes that CATVs and CLECs are not incurring similar internal costs for things like pre-construction inspections, post-construction inspections and quality control. CATVs and CLECs **should** be performing these tasks prior to, and in addition to, Alabama Power's performance of those tasks. Second, and perhaps more importantly, the allegation incorrectly presumes that AT&T is actually inspecting its plant. For all it appears, this is not the case. AT&T has violations just about everywhere. As set forth in the testimony of Pam Boyd, it is almost impossible to drive more than 5 minutes in any part of the Birmingham area served by overhead construction without seeing an AT&T line with violations, overloading issues or transfer delays on an Alabama Power pole.[45]

With respect to the second part of AT&T's argument in sentences four, five, six and seven, AT&T either misses or completely ignores the elephant in the room: any cancelling effect of reciprocal terms is inversely proportional to pole ownership. Here, where AT&T enjoys those

[45] *See* Ex. A at APC000031 (Boyd Declaration ¶ 15).

benefits on 630,000 poles and Alabama Power enjoys them only on 179,000 poles, Alabama Power is 451,000 poles "in the hole" on the reciprocal benefits. **The reciprocal benefits—benefits AT&T's seem to acknowledge—disproportionately benefit AT&T given the parties' relative pole ownership.** And this is where the cost sharing provisions of the joint use agreement step in to level the field.

Moreover, in addition to what appears to be a general failure by AT&T to inspect its facilities on Alabama Power's poles, AT&T has an atrocious record on inspecting, maintaining and replacing its own pole plant.[46] AT&T routinely fails to make timely transfers and rearrangements.[47] And AT&T repeatedly falls short of complying with the party's operating routines and work practices, including but not limited to modification billing authorizations.[48] AT&T has achieved enormous cost savings by owning fewer poles, by failing to maintain the poles that it owns, by failing to maintain its facilities on Alabama Power's poles, and by failing to meet its basic operational obligations. When AT&T falls down on its responsibilities, Alabama Power is required to pick up the slack, lest the joint use network degrade into logjam, danger and uselessness. For example, AT&T does not perform ground line inspections on its poles (which detect rot and deterioration) so Alabama Power is performing this inspection at its own cost.[49] The fact that AT&T is now challenging the basic economics of the joint use agreement under these

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[46] *See* Ex. A at APC000032 (Boyd Declaration ¶ 15); Ex. 1 at APC000307 (JUA, Art. VIII(A)) ("[AT&T] shall, at its own expense, maintain its joint use poles in a safe and serviceable condition…and shall replace poles that become defective....").

[47] *See* Ex. A at APC000032 (Boyd Declaration ¶ 15); Ex. 1 at 306 (JUA, Art. VI(B)).

[48] *See* Ex. C at APC000082 (Morgan Declaration ¶ 18).

[49] *See* Ex. A at APC000032 (Boyd Declaration ¶ 15).

circumstances makes AT&T's claims even more incredible. Alabama Power denies any remaining allegations in paragraph 13.

14. With respect to the first sentence of paragraph 14, Alabama Power denies that it "has not produced and cannot produce evidence of net benefits that give AT&T a material advantage" over its competitors. What AT&T really means, here, is that it refused to afford any weight to the issues Alabama Power raised or the evidence that Alabama Power produced. As set forth in paragraphs 15-23 of AT&T's own complaint, Alabama Power previously identified eight specific advantages that AT&T enjoys over its competitors by virtue of the joint use agreement.[50] But these are not the only advantages AT&T enjoys. AT&T, for example, also enjoys a contractual right to remain attached to Alabama Power's poles even in the event of a termination.[51] As explained more fully in the testimony of Kenneth Metcalfe, **this provision alone (which does not exist in Alabama Power's pole license agreements with CATVs and CLECs) provides a net benefit to AT&T of $[redacted] on an annualized basis ($[redacted]/pole)**—far more than the net annual rental payment or per pole payment that AT&T makes to Alabama Power.[52]

With respect to the second, third, fourth and fifth sentences of paragraph 14, Alabama Power denies AT&T's allegation that it rejected "AT&T's request for a rate reduction." As set forth in paragraph 7 above, Alabama Power offered AT&T roughly $[redacted] in annual relief to

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[50] AT&T Pole Attachment Complaint, at ¶¶ 15-23.

[51] *See* Ex. 1 at APC000308 (JUA, Art. XV).

[52] *See* Ex. D at APC000100 (Affidavit of Kenneth P. Metcalfe, CPA, CVA, June 20, 2019) ("Metcalfe Aff.") ¶ 23). The fact that CATV and CLEC licensees may have an extracontractual right to remain attached to Alabama Power's poles under certain circumstances is of no consequence to this analysis. All parties agree that AT&T has no right of access under the law. AT&T either obtains this right through contract, or they don't have it at all.

AT&T's contractual cost-sharing. Alabama Power admits that, pursuant to AT&T's request, it provided AT&T with an exemplar CATV pole license agreement and an exemplar CLEC pole license agreement, but denies that those agreements were "cherry-picked." Those agreements were representative, which was a vastly more efficient manner of conducting a good faith conversation about the value of the joint use agreement. As it turns out, AT&T was never interested in a good faith conversation about the value of the joint use agreement (the same joint use agreement AT&T desperately wanted to retain). In any event, AT&T does not pay "rental rates [redacted] times the rates that apply to its competitors." If Alabama Power's CATV and CLEC licensees burdened as much space on Alabama Power's poles as AT&T, they would pay a rate in excess of the "rate" paid by AT&T.[53] Alabama Power denies AT&T's allegation that the eight specific benefits Alabama Power itemized in the July 19, 2018 letter are "not benefits at all" (as set forth more fully in paragraph 15-23 below). Moreover, these benefits, along with AT&T's additional advantages under the joint use agreement—including but not limited to the right to remain attached to existing joint use poles even in the event of a termination—more than justify the contractual cost sharing provisions of the joint use agreement. Alabama Power denies any remaining allegations in paragraph 14.

3. Alabama Power identified at least eight specific benefits of the joint use agreement during the discussions between the parties, but AT&T refused to consider any of them.

15. Alabama Power admits and affirms that **it would not have installed 40-foot poles in AT&T's service territory but for its joint use agreement with AT&T**.[54] Alabama Power's

[53] *See* ¶ 12, *supra*.

[54] *See* Ex. A at APC000029 (Boyd Declaration ¶ 8).

distribution engineering design standards have evolved over time, but at one point, the standard required only 38" for a three-phase line, which would have required no taller than a 30-foot pole.[55] Even the most current standard requires only 84" for a three-phase line, which would require no taller than a 35-foot pole.[56] Alabama Power requires even less space when the line is single phase or secondary. As set forth by Alabama Power in its July 19, 2018 letter (but omitted from AT&T's recitation of the facts): "In fact, it would have been imprudent for Alabama Power to invest in taller/stronger infrastructure than necessary for its own service needs without the [joint use agreement]."[57] Alabama Power does not need a "communications worker safety zone" on its poles if there are no communications attachments. AT&T not only was the first communications attacher on the pole (by virtue of its status as the incumbent LEC), but also remains the only communications attacher on many poles owned by Alabama Power within the joint use network.[58] This is not mere hypothesis, either. The data bears it out. The average height of Alabama Power's joint use poles is [redacted] feet.[59] The average height of those poles to which only Alabama Power is attached is [redacted] feet.[60]

AT&T's allegations regarding the existence of 35-foot joint use poles miss the point. Alabama Power does not contend, nor has it ever contended, that there are no joint use poles of

[55] *See* Ex. A at APC000029-30 (Boyd Declaration ¶ 9).

[56] *See* Ex. A at APC000029-30 (Boyd Declaration ¶ 9).

[57] Ex. 14 at APC000482 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (July 19, 2018) ("Alabama Power July 19, 2018 Letter")).

[58] *See* Ex. C at APC000078, -81 (Morgan Declaration ¶¶ 10, 15).

[59] *See* Ex. C at APC000079 (Morgan Declaration ¶ 11).

[60] *See* Ex. C at APC000079 (Morgan Declaration ¶ 11).

heights other than 40-foot. There are joint use poles of many different heights. Whether the poles were 35-foot, 40-foot, 45-foot or something else, **AT&T was not required to pay make-ready to access those poles in the first instance**; Alabama Power's CATV and CLEC licensees **were** required to pay make-ready. This avoidance of make-ready costs at the point of initial access was a massive benefit to AT&T over its competitors. **As set forth in the affidavit of Ken Metcalfe, the annualized net benefit of AT&T's avoided make-ready costs is $[redacted] ($[redacted]/pole)**.[61] Alabama Power denies any remaining allegations in paragraph 15.

16. Paragraph 16 of the complaint should be seen for what it is: a poorly conceived and desperate effort to shirk the present economic consequences of a network constructed in a manner to save AT&T hundreds of millions of dollars. It is like the anchor tenant of a building claiming that the developer really built the building to rent an extra office to a much smaller tenant. The fact that the parties contemplated that third parties might attach to joint use poles in no way undermines the basis upon which the joint use network was constructed—to specifically meet the needs of the parties to the joint use agreement.

Alabama Power specifically denies the allegation that "in recent years AT&T has paid Alabama Power substantial sums for make-ready in order to create sufficient space for AT&T's facilities on Alabama Power's poles." AT&T does not pay "make-ready" to Alabama Power in the same way that CATV and CLEC licensees pay "make-ready." First, in the event the alleged "make-ready" is rearrangement of Alabama Power's facilities, this is a cost that Alabama Power—not AT&T—bears under the joint use agreement.[62] Under Alabama Power's CATV and CLEC

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[61] *See* Ex. D at APC000103-04 (Metcalfe Aff. ¶ 31).

[62] *See* Ex. 1 at APC000306 (JUA, Art. VI(B)) (". . . each party at its own expense shall place, maintain, rearrange, transfer and remove its own attachments . . . .")

license agreements, this is a cost the CATV and CLEC bears. Second, in the event the "make-ready" involves a pole replacement, Appendix A to the joint use agreement not only sets forth precisely how the costs are calculated, but also identifies the cost (by dollar amount) that AT&T is expected to bear.[63] In other words, AT&T does not have to wait for an estimate to understand what the cost will be in the event it requires additional space on a joint use pole; AT&T can look at Appendix A and know the answer immediately. Moreover, the joint use agreement **requires** Alabama Power to replace a pole if AT&T needs more space.[64] Alabama Power is not obligated to replace poles under its CATV and CLEC pole license agreements.[65] Third, the evidence cited by AT&T for this proposition is not a compilation of modification billings or a number of any sort; it is vague testimony that repeats, verbatim, the allegation itself.[66] Though AT&T does not characterize what it means by "in recent years," during the years 2014-18, AT&T paid (or owes) Alabama Power a total of [redacted] for modification billing under the joint use agreement.[67] Over this same period, for this same work, a CATV or CLEC licensee would have paid [redacted] in make-ready charges.[68]

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[63] *See* Ex. 1 at APC000310-15 (JUA, App'x A).

[64] *See* Ex. 1 at APC000307 (JUA, Art. VII.C).

[65] *See* Ex. 6 at APC000397 (Pole License Agreement effective May 24, 2017, at ¶ 5); Ex. 5 at APC000358 (Pole License Agreement effective March 7, 2018, at ¶ 5); Ex. 7 at APC000433 (Template CLEC Agreement, at ¶ 5).

[66] *See* AT&T Pole Attachment Complaint, at Ex. B at ATT00048 (Affidavit of Diane W. Miller, Apr. 16, 2019, ¶ 16).

[67] *See* Ex. C at APC000080 (Morgan Declaration ¶ 13).

[68] *See* Ex. C at APC000080 (Morgan Declaration ¶ 13).

In addition to the cost savings advantages to AT&T for "make-ready" work, Alabama Power also replaces AT&T's defective joint use poles at the same prices set forth in Appendix A. Because AT&T does not maintain crews that are qualified to replace poles in jointly used lines, Alabama Power is required to perform this work. Between 2011 and 2018, Alabama Power replaced 6,963 defective poles for AT&T at a total cost, per Appendix A, of [redacted] (average of $[redacted] per pole). Had this same work been charged to AT&T at the cost CATVs and CLECs pay for make-ready work, the cost would have been in excess of $[redacted]lion.[69] The $[redacted] cost savings to AT&T under this arrangement does not even account for AT&T's avoided cost of retaining crews of sufficient expertise to service their own poles.

Appendix A not only saves AT&T money on pole replacements as compared to pole replacement work performed for the benefit of CATVs and CLECs, but it also allows AT&T to continue to operate its business without carrying the cost of the crews necessary to service its pole plant. **Given the current dynamics in the relationship, the only item of value flowing in Alabama Power's direction is the annual net rental payments**. AT&T's eager consumption of its benefits under the joint use agreement (in conjunction with its unwillingness to let any of them go) makes AT&T's challenge to the **one** item of net value to Alabama Power under the joint use agreement frustrating, to say the least. Alabama Power denies any remaining allegations in paragraph 16.

17. Alabama Power admits that AT&T is greatly advantaged because it pays scheduled costs instead of actual make-ready costs. The second sentence of paragraph 17 of the complaint is hard to unpack because it is so riddled with error. The best Alabama Power understands, AT&T is attempting to allege that it pays the same costs for the same work as paid by Alabama Power's

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[69] *See* Ex. C at APC000080-81 (Morgan Declaration ¶ 14).

CATV and CLEC licensees. This is not the case. AT&T pays scheduled costs (that were last updated in 2010); CATV and CLEC licensees pay current work order costs. Work order costs are based on then-current labor and materials for a particular job in a particular location; work order costs are much closer to actual costs than Appendix A costs. For example, if Alabama Power replaced an existing 40-foot joint use poles with a 45-foot pole at AT&T's request, AT&T would pay between $[redacted] under Appendix A, depending on the age of the existing pole, butregardless of whether the pole was accessible, inaccessible, single phase or three phase.[70] By comparison, a CATV or CLEC licensee would pay between $[redacted] and $[redacted] for the work, depending on whether the pole was accessible, inaccessible, single phase or three phase.[71] Alabama Power denies any remaining allegations in paragraph 17.[72]

18. Alabama Power admits that AT&T is advantaged by both (1) its standard space allocation of [redacted] feet under the joint use agreement, and (2) the option to occupy more than its allocated space with no additional cost sharing obligations. Alabama Power denies AT&T's allegation that the joint use agreement "does not dedicate [redacted] feet of space to AT&T's exclusive use." To the contrary, the definition of "standard space allocation" within the joint use agreement

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[70] *See* Ex. C at APC000079 (Morgan Declaration ¶ 12).

[71] *See* Ex. C at APC000080 (Morgan Declaration ¶ 12).

[72] Footnote 38 in AT&T's complaint alleges: "In addition, the make-ready terms of the JUA are better for Alabama Power than for AT&T" because "AT&T—and not Alabama Power—is required to pay premiums for certain pole replacement and removal work." AT&T Pole Attachment Complaint, at ¶ 17 n.38 (*citing* JUA, App'x A, p. 4). The so-called "premium" applies only where Alabama Power is installing or replacing an AT&T-owned pole. This "premium" does not apply when Alabama Power is replacing one of its own poles for AT&T. In fact, this so-called "premium" really just underscores another massive benefit to AT&T under the joint use agreement: AT&T is not required to maintain the crews necessary to meet its pole replacement obligations; it can rely on Alabama Power crews to do the work for them.

provides: "For Telephone Company, the exclusive use of [redacted] feet of space on 40-foot poles, measured upward from the point of attachment on the pole, required to provide at all times the CODE minimum clearance above ground for the lowest horizontally run line wire or cable attached in such space."[73] The standard 40-foot joint use pole provides specifically for this [redacted] feet of space.[74] This space is also protected under Alabama Power's agreements with CATV and CLEC licensees. The CATV and CLEC agreements provide:

> [Alabama Power] is a party to joint use agreements with various telephone companies that own pole throughout its service area.... Under the joint use agreements the telephone company is allocated the exclusive use of certain space ([redacted]), measured upward from the lowest point of attachment required to provide NESC and/or Alabama Department of Transportation minimum clearance above ground.... In no event shall Licensee place its Attachments with such allocated space on the joint use distribution pole without proper permission of the party which has been allocated the space. If such permission is granted to Licensee by the telephone company, and at some later date the party to which the space is allocated needs to utilize the space occupied by Licensee's Attachment, Licensee either shall remove its Attachment or pay Licensor's cost to replace the pole or make other required modifications.[75]

Alabama Power denies that "AT&T does not want, require, or occupy [redacted] feet of space or more on Alabama Power poles." Notably, AT&T has produced no data whatsoever to support this notion. In fact, the limited data produced by AT&T tells the exact **opposite** story. AT&T submitted eight photographs of Alabama Power poles, along with measurements.[76] Even in these eight cherry-picked instances submitted by AT&T, AT&T is occupying [redacted] feet of space on

[73] Ex. 1 at APC000305 (JUA, Art. I(M)).

[74] *See* Ex. 1 at APC000305, -19 (JUA, Art. I(L), (M); JUA, App'x B, Ex. 2).

[75] Ex. 5 at APC000359 (Pole License Agreement, effective Mar. 7, 2018, ¶ 8(a), (b)); Ex. 6 at APC000398 (Pole License Agreement, effective May 24, 2017, ¶ 8(a), (b)).

[76] *See* AT&T Pole Attachment Complaint, at Ex. B at ATT00053-60 (Affidavit of Diane W. Miller, Apr. 16, 2019, Ex. M-1).

average.[77] Alabama Power's own data reveals that, based on a more representative sampling, the average height of AT&T's highest attachment is [redacted] feet and the average mid-span clearance of AT&T's lowest attachment is [redacted] feet, which means AT&T is occupying, on average, [redacted] feet of space (not including any portion of the safety space).[78] The average space occupied by AT&T is partially attributable to multiple attachments and partially attributable to the sag produced by AT&T's thicker and heavier bundles.[79] In short, AT&T occupies more than its allocated [redacted] feet of space under the joint use agreement. And, unlike Alabama Power's CATV and CLEC licensees, AT&T's cost sharing obligations do not change based on this additional occupancy.

Alabama Power also denies the allegations in the last sentence of paragraph 18. First, Alabama Power's CATV licensees, under the Commission's formula, pay a pro rata share of the entire pole based on the amount of usable space occupied. If the inputs are based on the Commission's presumptions, then a CATV licensee would pay 7.41% (1/13.5) of the annual cost of the entire pole, which does not allocate any cost of the safety space to the CATV. Second, as referenced in paragraph 12 above, on poles owned by Alabama Power, the "safety space" (more accurately denominated as the "communications worker safety zone" in the NESC), exists for the benefit of AT&T and other communications attachers. Alabama Power does not need the safety space on its own poles because its line workers (and contractors) are trained to work with and amongst energized electric supply lines. It is AT&T (and the other communications attachers) who

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[77] *See* Ex. E at APC000153, -155 (Arnett Declaration, pp. 6, 8).

[78] *See* Ex. C at APC000077-78 (Morgan Declaration ¶ 7).

[79] Ex. E at APC000153 (Arnett Declaration, p. 6) ("Cable sag determines the point of attachment on a pole. As sag increases, so does the require height of attachment on the pole and therefore, the space utilized by the attachment.")

need the safety space on Alabama Power's poles.[80] If the Commission is inclined to blue-pencil the methodology by which AT&T and Alabama Power agreed to share the cost of the safety space in the joint use network, the cost should be allocated entirely to the **licensee** on each pole, not the pole owner.[81] Alabama Power denies any remaining allegations in paragraph 18.

19. Alabama Power admits that AT&T is advantaged by virtue of paying "per-pole rates" regardless of AT&T's number of attachments or actual space occupied, whereas CATV and CLEC licensees pay on a per attachment (or space occupied) basis. Alabama Power denies that a "per-pole rate" is "a right provided to all attachers by the FCC's pole attachment rate formula." But this is probably just semantics because regardless of whether a CATV is said to have two attachments or occupy two feet of space, the CATV licensee would pay 2x the "one-foot" CATV rate.[82] Further, the Commission has previously stated: "When an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole

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[80] *See* Ex. A at APC000030 (Boyd Declaration ¶ 11).

[81] Alabama Power concedes that AT&T would not need safety space on AT&T's poles but for Alabama Power's presence. For this reason, if the Commission blue-pencils the cost sharing methodology to make it more consistent with Alabama Power's CATV and CLEC pole license agreements, the Commission should assign the safety space to AT&T on Alabama Power's poles, and to Alabama Power on AT&T's poles.

[82] Footnote 46 of the complaint alleges: "The pole owner cannot lawfully multiply the rental rate for 1 foot of space by the number of feet of space used, as doing so would assign the attacher more unusable space than the statute allows." AT&T Pole Attachment Complaint, ¶ 19 n.46. If AT&T's contention is correct, then this means a CATV licensee would pay more than a CLEC licensee for the same space occupied. This would discriminate against CATV licensees, and is the reason why the Commission should apply both formulas on a per-foot basis. Any mathematic or policy rationale for applying the section 224(e) rate in the manner urged by AT&T evaporated when the Commission intentionally calibrated the one-foot "new telecom rate" to equal the one-foot CATV rate.

owner, the one-foot presumption can be rebutted."[83] Alabama Power denies any remaining allegations in paragraph 19.

20. Alabama Power admits that AT&T is advantaged by virtue of occupying the lowest position on the pole, and further admits that AT&T "was the only consistent attacher in the communications space when joint use originated." The fact that AT&T "was the only consistent attacher in the communications space when joint use was originated" further confirms that AT&T was the cost-causer of the safety space on joint use poles owned by Alabama Power. The remainder of paragraph 20 of the complaint attempts to explain away the advantages of occupying the lowest position on the pole. This is a specious claim given (a) that AT&T obtained the right to occupy the lowest position on the pole in the 1978 joint use agreement, (b) that AT&T has never sought to renegotiate this provision, and (c) that AT&T has never suggested it should raise its lowest attachments to make room for a new attacher beneath it.[84] That said, Alabama Power does not intend to quantify this benefit, so long as AT&T is content to release its right to the lowest position on the pole in any new, going forward arrangement. Alabama Power denies any remaining allegations in paragraph 20.

21. Alabama Power denies the allegations in the first and second sentences of paragraph 21. AT&T incorrectly alleges that "it pays for inspections at the time of attachment differently than its competitors." AT&T does not pay Alabama Power for inspections **at all**. The fact that AT&T might inspect the work itself is of no consequence; even if Alabama Power's CATV and CLEC licensees performed such inspections (and many do), they are still required to

[83] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6799 (1998).

[84] *See* Ex. C at APC000083 (Morgan Declaration ¶ 21).

pay inspection fees to Alabama Power. In other words, AT&T is presuming (incorrectly) that Alabama Power's CATV and CLEC licensees do not inspect their own work. Regardless, what matters here is not whether/how the internal costs compare as between AT&T and Alabama Power's CATV and CLEC licensee, but what amounts each party is required to pay Alabama Power under its contracts.

With respect to the allegations in the third sentence of paragraph 21, Alabama Power does not have access to the confidential version of the *Verizon Virginia* decision and therefore lacks knowledge or information sufficient to admit or deny the allegations. But, given the above, it is hard to fathom that *Verizon Virginia* stands for the proposition asserted by AT&T because (a) it would require a baseless assumption about the work practices (or lack thereof) by CATV and CLEC licensees, and (b) it would require a comparison of internal labor costs between AT&T and Alabama Power's CATV and CLEC licensees, rather than the objective comparison of the costs paid by each entity to Alabama Power under their respective contracts. Alabama Power denies any remaining allegations in paragraph 21.

22. Alabama Power admits that AT&T has a more favorable liability sharing provision in the joint use agreement than the indemnification provision in Alabama Power's CATV and CLEC license agreements, but denies that "both assign liability based on fault." Under the joint use agreement, "[e]ach party shall be liable for all damages…caused solely by its negligence or solely by its failure to comply at any time with the Code."[85] Further, where there is concurrent negligence, "[e]ach party shall be liable for all…injuries to its own employees or its own property…."[86] Where damage or injury to third parties or third-party property "cannot be traced

[85] *See* Ex. 1 at APC000308 (JUA, Art. XII(1)).

[86] *See* Ex. 1 at APC000308 (JUA, Art. XII(2)).

to the sole negligence of either party," the parties share the liability 50/50.[87] Alabama Power's CATV and CLEC license agreements, on the other hand, require broad indemnification for all claims "arising or claimed to have arisen by, through or as a result of any of Licensee's cables, wires, appliances, equipment or facilities attached to [Alabama Power's] poles…."[88]

Alabama Power denies that the reciprocal nature of the liability sharing provision moots the value of this provision to AT&T. As set forth above in paragraph 13, the reciprocal provisions in the joint use agreement disproportionately benefit the licensee. AT&T is the licensee on 630,000 of the 809,000 joint use poles. This means AT&T enjoys the risk management benefits of the liability sharing provisions in the joint use agreement—as opposed to the strict indemnity obligations of the CATV and CLEC pole license agreements—on 451,000 more poles than Alabama Power. AT&T's argument that these reciprocal provisions somehow "net out" defies basic math. Alabama Power denies any remaining allegations in paragraph 22.

23. Alabama Power admits that the joint use agreement, unlike Alabama Power's pole license agreements with CATVs and CLECs, does not require AT&T to obtain insurance (or to name Alabama Power as an additional insured on its policies) or provide a bond. Alabama Power further admits that this provision of the joint use agreement is reciprocal, but denies that this reciprocity "cancels out" the benefit to AT&T. Alabama Power denies any remaining allegations in paragraph 23 and further asserts that it does not intend to quantify the economic benefit to AT&T associated with this difference.

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[87] *See* Ex. 1 at APC000308 (JUA Art. XII(3)).

[88] *See* Ex. 6 at APC000408 (Pole License Agreement effective May 24, 2017, at ¶ 26(b)); Ex. 5 at APC000368-69 (Pole License Agreement effective March 7, 2018, at ¶ 26(b)).

4. AT&T's understanding of the law and the application of the Commission's formulas is incorrect.

24. Alabama Power denies that it "has not met and cannot meet its burden" in this case. The facts and circumstances presented by Alabama Power in this case meet or exceed its burden. Moreover, as set forth in paragraph 12 above, if AT&T were in fact entitled to the new telecom rate, it would equate to a per pole rate that is higher than the rate paid by AT&T under the existing joint use agreement. Alabama Power denies any remaining allegations in paragraph 24.

25. Alabama Power denies the allegations in paragraph 25, and specifically rejects AT&T's interpretation of the 2018 Order. The Commission identified the pre-existing telecom rate as a "hard cap" only with respect to "contracts entered into or renewed after the effective date of [Rule 1.1413]."[89] As set forth above in paragraph 11, the joint use agreement at issue here was neither "entered into" nor "renewed" after March 11, 2019. The joint use agreement was "entered into" in 1978 and the cost-sharing methodology was last amended in 1994. It continues in effect today. Even if the joint use agreement could subsequently be "renewed" after March 11, 2019, this "renewal" could not apply to existing joint use poles because neither party has the right to terminate the agreement (for convenience or default) with respect to joint use poles existing at the time of termination. <u>**Without a corresponding right to termination, there can be no "renewal."**</u> Similarly, without a right of termination, the joint use agreement cannot be in "evergreen" status. The Commission implicitly recognized the necessity of voluntary acquiescence to the "renewal" when it stated: "We recognize that this divergence from past practice will impact privately

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[89] 47 C.F.R. § 1.1413(b); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, Rel. Aug. 3, 2018, 33 FCC Rcd 7705 (2018) ("*2018 Order*").

negotiated agreements and so the presumption will apply only, as it relates to existing contracts, upon renewal of those agreements."[90]

To be clear, Alabama Power would **never** have negotiated an agreement like its joint use agreement with AT&T if the most it could recover was the one-foot CATV or telecom rate (old or new).[91] And even more to the point, Alabama Power would never have agreed to give AT&T the right to remain attached to Alabama Power's poles even in the event of a termination.[92] Perhaps this is why the Commission's new ILEC complaint rule is intended to apply to "newly negotiated," "new" or "renewed" agreements—there has to be some sort of voluntary acquiescence by both parties, and with respect to existing joint use poles under the joint use agreement between AT&T and Alabama Power, there is none.

Further, in outlining the protocol for implementing its new rule, the Commission clearly identified two distinct temporal categories of joint use agreements and, by implication, an important third category. First, paragraph 127 of the 2018 Order states: "We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements."[93] And it was with reference to this presumption that the Commission stated: "if the presumption we adopt today is rebutted, the pre-2011 Pole Attachment Order telecommunications carrier rate is the maximum rate that the utility and the incumbent LEC may negotiate."[94] Second, the Commission specifically

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[90] *2018 Order*, ¶ 127.

[91] *See* Ex. A at APC000031 (Boyd Declaration ¶ 14).

[92] *See* Ex. A at APC000031 (Boyd Declaration ¶ 14).

[93] *2018 Order*, ¶ 127.

[94] *2018 Order*, ¶ 129.

carved-out a different—and more flexible—approach for "agreements that materially advantage an incumbent LEC and which were entered into after the 2011 Order and before the effective date of the Order we release today."[95] For this category of agreements, the pre-existing telecom rate serves only as a "reference point"—not a "hard cap."[96] The third temporal category of agreements, by implication, are those agreements "entered into" or "renewed" prior to the effective date of the 2011 Order, which would include the joint use agreement at issue here. And if the rules are progressively more flexible as the temporal category becomes more distant in time, then it stands to reason that an even more flexible approach (*i.e.* even more flexible than the old telecom rate serving as a mere reference point) would apply to this oldest category of agreements. Further, even if the pre-existing telecom rate serves as a "hard cap" in this case, the pre-existing telecom rate is not a fixed number—it is the product of a formula that depends on a number of variables, as explained in paragraph 26 below.

26. Alabama Power denies the allegations in paragraph 26. The pre-existing telecom rate formula validates, rather than undermines, the justness and reasonableness of the cost sharing arrangement in Appendix B to the joint use agreement. Even assuming AT&T occupies only [redacted] feet of usable space (the actual data demonstrates it is slightly higher), and even assuming an average of three attaching entities (the actual data demonstrates it is [redacted]), then the pre-existing telecom rate applicable to AT&T under the Commission's formula would be as follows:[97]

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[95] *2018 Order*, ¶ 127 n.475.

[96] *Id.* ("the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point").

[97] Ex. B at APC000059 (Conwell Declaration ¶ 12).

	2011	2012	2013	2014	2015	2016	2017
Pre-Existing Telecom Rate	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Contact rate paid by AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

The fundamental flaw in all of AT&T's calculations within its complaint is the presumption that AT&T occupies (and should be allocated) only one-foot of pole space on Alabama Power's poles. As set forth above, this presumption is not merely inaccurate—it is spectacularly wrong. And it fails entirely to address the allocation of the safety space which, as set forth above, was built into Alabama Power's joint use poles for the benefit of AT&T. Moreover, simply comparing the per pole rates above glosses over the enormous offset paid by Alabama Power to AT&T on a per pole basis. Even accepting as accurate the data submitted by AT&T, **<u>Alabama Power, for the past three years, has paid AT&T a per pole rate that exceeds AT&T's actual annual pole cost as calculated under the Commission's formula</u>**. The chart below identifies the per pole rate paid by Alabama Power to AT&T each year, along with AT&T's actual corresponding annual pole cost.

	2015	2016	2017
Per Pole Rate paid by Alabama Power to AT&T	[redacted]		
AT&T Annual Pole Cost[98]	[redacted]		

Thus, on average, the rates paid by AT&T under the joint use agreement since 2011 have been only slightly higher than the pre-existing telecom rate, and a good bit **<u>lower</u>** than the rate a CATV

[98] This statement of AT&T's annual pole cost presumes the accuracy of the data submitted by AT&T witness Daniel Rhinehart. *See* AT&T Pole Attachment Complaint, at Ex. A at ATT00039 (Affidavit of Daniel P. Rhinehart, April 16, 2019, Ex. R-4).

licensee would have paid for the same space. And this is before even considering the enormous offsetting effect of the amounts paid by Alabama Power to AT&T. In short, the rates paid by AT&T to Alabama Power under the joint use agreement are squarely within the parameters of the Commission's formulas.

B. The Cost-Sharing Arrangement in the Existing Joint Use Agreement is Just and Reasonable, and Has Been Since Long Before 2011.

1. AT&T never challenged or otherwise questioned the Appendix B cost-sharing methodology until March 7, 2018.

27. Alabama Power admits that AT&T has been entitled to a just and reasonable rate since July 12, 2011, but denies that the cost-sharing arrangement within the existing joint use agreement yields unjust or unreasonable rates. Perhaps more importantly, for all it appears, AT&T itself viewed the joint use agreement as just and reasonable until very recently. Despite its rights under the law since July 12, 2011, **AT&T first took exception to the cost sharing methodology in the existing joint use agreement on March 7, 2018**.[99] Alabama Power denies any remaining allegations in paragraph 27.

28. AT&T's allegations in paragraph 28 are largely repetitive of allegations addressed above. But AT&T also raises an additional—and mathematically incorrect—allegation. AT&T contends that the rates it pays under the joint use agreement are increasing at a pace higher than the increases in Alabama Power's CATV and CLEC pole attachment rates. Not so. As AT&T is prone to omit, the so-called "rate increases" under the joint use agreement are not unilateral increases by Alabama Power, but instead annually updated calculations that reflect updated pole cost data. Like the Commission's formulas, Appendix B of the joint use agreement is a cost-based

[99] *See* Ex. 9 at APC000466 (Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018)) ("AT&T Mar. 7, 2018 Letter); Ex. A. at APC000032 (Boyd Declaration ¶ 16); Ex. C at APC000082 (Morgan Declaration ¶ 17).

formula. But Appendix B, unlike the Commission's formula, includes a fixed limited operating charge (akin to the Commission's annual carrying charge rate). This fixed limited operating charge reduces volatility in the rates yielded by the Appendix B formulas and brings predictability to both parties. Appendix B has not been revised since 1994. Alabama Power denies any remaining allegations in paragraph 28.

29. The reasonableness of Appendix B is further revealed through the methodology by which it allocates the joint use network costs to the parties. The original premise of the joint use agreement was that AT&T and Alabama Power could both save money and right-of-way clutter by sharing a single network of poles, rather than each party constructing a redundant network. For this reason, it makes sense that the parties would evenly divide those network costs that inured equally to the parties' benefit—such as the portion of the pole underground necessary for vertical support, the portion of the pole above ground up to the point of minimum grade clearance, and the safety space—while allocating pro rata the portions of the network that did not. Appendix B did just that. Alabama Power admits that, under Appendix B, AT&T is responsible for [redacted]% of Alabama Power's annual pole cost as calculated pursuant to Appendix B and that Alabama Power is responsible for [redacted]% of AT&T's annual pole cost as calculated pursuant to Appendix B, and that this allocation appears not only in the original version of Appendix B, but also in the 1984 revision, the 1990 revision and the 1994 revision. In other words, even as AT&T's relative ownership of jointly used poles changed over the years, its allocated share of the network costs never increased. This fact, in particular, weighs heavily against the false narrative that relative pole ownership somehow equates to bargaining power.

Alabama Power denies that it uses more than its allocated space, on average. Even currently, Alabama Power's distribution engineering design standard requires only 7 feet for a three-phase line (less for single phase and secondary lines); previously, the standard required even less space.[100] Alabama Power also denies that it "uses" the safety space (a/k/a the "communication worker safety zone") on its own poles with any level of frequency to matter in the allocation of costs between the parties. On the jointly used poles owned by Alabama Power, it is AT&T that "uses" the safety space. As set forth above, Alabama Power does not need this space for its own operations. **The safety space was built into the network because of AT&T**. Alabama Power admits, though, that on AT&T-owned joint use poles, Alabama Power "uses" the safety space because, presumably, AT&T would not have needed this separation space on its poles but for the presence of Alabama Power's electric facilities. Alabama Power denies that it is collecting rent from third parties attached in AT&T's allocated space. As set forth above, AT&T is occupying far more than its allocated space. Further, where there are third parties attached to joint use pole owned by Alabama Power—and especially where there is more than one third-party attached—it is usually the result of Alabama Power's installation of a taller pole through the CATV/CLEC make-ready process. Alabama Power denies any remaining allegations in paragraph 29.

30. Alabama Power denies that its relative pole ownership was either an "advantage" or that it "continuously impacted AT&T's ability to negotiate a just and reasonable rate over time." First, owning 78% of the joint use network is a burden, not an advantage. To put this in financial perspective, Alabama Power's annual carrying cost for a single pole based on year ending 2017 data was $[redacted].[101] On the other hand, the per pole rate paid by Alabama Power to AT&T under the joint use agreement for this same period was $[redacted]. In other words, it is cheaper for Alabama

[100] *See* Ex. A at APC000029-30 (Boyd Declaration ¶ 9).

[101] *See* Ex. B at APC000058 (Conwell Declaration ¶ 9).

Power to **not** own poles. The same is true for AT&T, which is why AT&T has refused in the vast majority of cases, to set its own poles. AT&T knows, as Alabama Power knows, that it is cheaper to rent than own. Second, the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is a foundational error. For this to be true, Alabama Power would need the ability to kick AT&T off its poles. As set forth above, Alabama Power lacks the contractual ability to do so. Further, for AT&T's allegation to have any merit, one of two additional conditions would also need to exist, either: (1) the joint use agreement was unjust and unreasonable at the time it was first executed; or (2) Alabama Power subsequently wielded the growing pole ownership imbalance to its financial benefit. Neither condition exists.

First, AT&T cannot credibly contend that the joint use agreement, executed in 1978 was unjust or unreasonable. To its credit, AT&T does not make such a spurious allegation. And for good reason. **AT&T's own internal standards from the 1970s identify a [redacted]%/[redacted]% split as the "most equitable" division of costs**.[102] The same standard identifies a [redacted]%/[redacted]% division of costs as "almost as good" as the "most equitable" method.[103] In other words, the cost sharing arrangement in Appendix B was squarely within AT&T's "most equitable" target.[104] Second, the cost sharing arrangement in the joint use agreement never materially changed after 1978. Though the parties simplified the manner for calculating average embedded pole cost in the

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[102] *See* Ex. E at APC000160, -227, -243 (Arnett Declaration, p. 13; Ex. E-14 at pp. 1, 17).

[103] *See* Ex. E at APC000243 (Arnett Declaration, at Ex. E-14 at p. 17).

[104] The entire testimony of Christian Dippon, a witness for AT&T in this case, depends upon the premise that the original agreement was the result of unequal bargaining power—a fact clearly and convincingly disproven by AT&T's own internal documents. *See* AT&T Pole Attachment Complaint, at Ex. D at Bates No. ATT00073 (Affidavit of Christian M. Dippon, April 16, 2019, ¶ 13).

1990 revision to Appendix B, this change did not inure to either party's financial benefit. The only other change to Appendix B during the entire life of the joint use agreement was to adjust the limited operating charges to reflect each party's actual cost experience over the preceding five years. Neither party has requested a change to Appendix B since 1994. And, perhaps more importantly, until March 7, 2018, AT&T never once complained to Alabama Power that the cost-sharing arrangement in the joint use agreement was unfair, unreasonable, unjust, inaccurate, outdated, or otherwise in need of revision. As set forth in the affidavit of Ken Metcalfe, the inability of Alabama Power to force AT&T to remove its attachments "effectively obviates any real or perceived bargaining power that might otherwise come with increased pole ownership."[105]

31. Alabama Power denies that either party to the joint use agreement is indefinitely "stuck" paying rentals to the other party in accordance with the current version of Appendix B. **Neither party is required to keep its facilities attached to the other party's poles**. Both parties retain the right at any time to remove some or all of their facilities from the other's poles.[106] If AT&T were to remove its facilities from some or all of Alabama Power's poles, it would no longer be bound to share in the cost of those poles.

Alabama Power admits that the joint use agreement contains an "evergreen" provision, but denies that AT&T has correctly identified it. An "evergreen" provision is a provision that indefinitely extends the expiration date of a contract.[107] The joint use agreement **does** contain such a provision. The first sentence of Article XV provides:

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[105] *See* Ex. D at APC000113 (Metcalfe Aff. ¶ 54).

[106] *See* Ex. 1 at APC000307 (JUA, Art. IX.B.)

[107] *See Bentley Systems, Inc. et al v. Intergraph Corp.*, 922 So. 2d 61, 75-76 (Ala. 2005) (defining an "evergreen" contract as one that "does not renew, but continues until such time as one party takes affirmative action to terminate it").

> Subject to the provisions of Article XI herein, this Agreement shall continue in full force and effect through June 1, 1988, and shall continue thereafter until terminated, insofar as the right to attach to additional joint use poles is concerned, by either party giving to the other party one (1) year's notice in writing of intention to terminate the right of both parties to attach to additional joint use poles.[108]

But the provision that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license, exercisable at the licensee's option. The second sentence of Article XV states:

> Any such termination of the right to attach to additional joint use poles shall not abrogate or terminate the right of either party to attach to existing joint use poles or to maintain existing attachments, and all such attachments shall continue thereafter to be maintained, pursuant to and in accordance with the terms of this Agreement, which Agreement shall so long as such attachments are continued, remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties with respect to such attachments.[109]

Similarly, Article XI.A. provides:

> Any such termination of the right to attach to such additional poles of the other by reason of any such default shall not abrogate or terminate the right of either party to attach to existing joint use poles or to maintain existing attachments, and all such attachments shall continue thereafter to be maintained pursuant to and in accordance with the terms of this Agreement, which Agreement shall, so long as such attachments are continued, remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties with respect to such attachments.[110]

As set forth above, where Alabama Power lacks the ability to terminate AT&T's license with respect to any existing joint use poles (including for reasons of default), there can be no "renewal" of the joint use agreement with respect to existing joint use poles. Similarly, the agreement cannot be in "evergreen" status with respect to existing joint use poles given that "evergreen" status is

[108] Ex. 1 at APC000308 (JUA, Art. XV(A)).

[109] Ex. 1 at APC000308 (JUA, Art. XV(A)).

[110] Ex. 1 at APC000307 (JUA, Art. XI(A)).

nothing more than an indefinite renewal, pending termination by either party. In this situation (as it relates to AT&T's facilities on Alabama Power's poles), it is Alabama Power—not AT&T—that is "forced" to continue the relationship; AT&T is the only party with a choice in the matter.

With respect to the final sentence of paragraph 31, Alabama Power admits that the parties held two face-to-face meetings in the year that followed AT&T's March 7, 2018 letter (which first challenged the cost-sharing methodology in Appendix B), but denies that Alabama Power, at any time, "leverage[d] its pole ownership advantage to deny AT&T the just and reasonable rate to which it is entitled." AT&T cites to no evidence in support of this allegation because there is none. If AT&T's lack of pole ownership was a problem for AT&T, it would stand to reason that AT&T would seek (or at least take) opportunities to move back towards parity of ownership. This has not been the case. In the initial June 1, 2018 meeting between the parties, Alabama Power asked AT&T if it was interested in returning to parity of ownership through a pole purchase or transfer.[111] AT&T's lead negotiator (Kyle Hitchcock, the predecessor to Dianne Miller) scoffed at the idea.[112] At no time during the discussion between the parties has AT&T ever expressed a willingness to own more poles under any scenario.[113]

Alabama Power also denies that there was "more than a year of effort" devoted to the discussions between the parties. The parties were in active communication between March 7, 2018 and September 11, 2018 (roughly a six-month period). On September 11, 2018, after already providing rate information and exemplar CATV and CLEC pole license agreements pursuant to

[111] *See* Ex. A at APC000033 (Boyd Declaration ¶ 18).

[112] *See* Ex. A at APC000033 (Boyd Declaration ¶ 18).

[113] *See* Ex. A at APC000033 (Boyd Declaration ¶ 18).

AT&T's request, Alabama Power wrote to AT&T asking for certain limited pieces of data, as well as clarification on certain key issues in connection with the operational provisions of the joint use agreement.[114] Alabama Power did not hear back from AT&T until January 31, 2019—nearly five months after Alabama Power's last communication to AT&T.[115]

2. AT&T refused to provide any data to Alabama Power during the discussions between the parties.

32. Alabama Power denies the allegations in the first sentence of paragraph 32. When Alabama Power explains why, in its view, AT&T is not similarly situated to Alabama Power's CATV and CLEC pole licensees, AT&T characterizes this as a denial of the applicability of the Commission's 2011 and 2018 Orders. Alabama Power admits, as referenced above, that AT&T is an ILEC and that it is neither a CATV nor CLEC, but denies that Alabama Power has "not disclosed the specific new telecom rates it charges AT&T's competitors." On June 15, 2018, pursuant to AT&T's request, Alabama Power transmitted its CLEC pole license agreement template to AT&T.[116] Exhibit A to the template CLEC agreement identified, in detail, the formulas used to determine the per attachment rate.[117] On July, 19, 2018, Alabama Power provided its annual pole cost for the year ending December 31, 2017, which is the base figure from which the CATV and CLEC rate formulas set forth in Exhibit A to the template apply.[118] On July 19, 2018,

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[114] *See* Ex. A at APC000034 (Boyd Declaration ¶ 22); Ex. 16 at APC000490-91 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (Sept. 11, 2018)) ("Alabama Power Sept. 11, 2018 Letter").

[115] *See* Ex. A at APC000034 (Boyd Declaration ¶ 23).

[116] *See* Ex. A at APC000033 (Boyd Declaration ¶ 20).

[117] *See* Ex. 7 at APC000454 (Alabama Power Template CLEC Agreement, at Ex. A).

[118] *See* Ex. 14 at APC000480 (Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (July 19, 2018)) ("Alabama Power July 19, 2018 Letter").

Alabama Power also provided AT&T redacted copies of an actual, executed CATV and CLEC pole license agreement so that AT&T could validate consistency with the previously provided template.[119]

Alabama Power denies that it "refused to provide any information" to support the reasonableness of the cost sharing arrangement in the joint use agreement. As set forth in paragraphs 15-23 of AT&T's complaint, Alabama Power specifically identified a handful of the numerous ways in which the joint use agreement provided AT&T with financial, operational and risk management advantages over Alabama Power's CATV and CLEC pole licensees.[120] Oddly enough, the very letter in which Alabama Power outlined these advantages is the evidence cited by AT&T for its incorrect allegation that Alabama Power "refused to provide any information" to support the reasonableness of the cost-sharing arrangement in the joint use agreement. Alabama Power also denies that the exemplar CATV and CLEC pole license agreements provided to AT&T were cherry-picked.[121] Alabama Power admits that its July 19, 2018 letter stated, accurately, that it was not Alabama Power's burden to prove the reasonableness of the cost-sharing arrangements in the joint use agreement. That was, of course, an accurate statement of the law at that time, and remains an accurate statement of the law with respect to all periods prior to March 11, 2019.

33. Alabama Power denies that AT&T **ever** attempted to negotiate a just and reasonable rate. It was a shake-down from the beginning. At no time during the process did AT&T

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[119] *See* Ex. 14 at APC000480 (Alabama Power July 19, 2018 Letter).

[120] *See* Ex. 14 at APC000480-84 (Alabama Power July 19, 2018 Letter).

[121] *See* Ex. A at APC000034 (Boyd Declaration ¶ 21); Ex. C at APC000083-84 (Morgan Declaration ¶ 23).

ever engage in good faith negotiations or even entertain an intellectually honest discussion about the differences between AT&T and Alabama Power's CATV and CLEC pole licensees.[122] From the outset, AT&T had a singular message—"we are entitled to the new telecom rate"—and zero capacity for thoughtful discussion about the serious issues involved in the radical restructuring of a 40+ year relationship demanded by AT&T.[123] Alabama Power admits that the first face-to-face meeting between the parties relating specifically to AT&T's March 7, 2018 letter was on June 1, 2018. Alabama Power admits that its representatives at that meeting had the necessary authority to discuss all matters relating to the joint use agreement, including the joint use network cost-sharing provisions. The June 1, 2018 discussions were unproductive principally because AT&T took the incredibly odd (and legally incorrect) position that the operational provisions of the joint use agreement had nothing to do with the cost-sharing provisions.[124] AT&T was thus unwilling to discuss any of the operational provisions in the joint use agreement and insisted on discussing the cost sharing provisions in a vacuum.[125] Though AT&T demanded a new cost-sharing proposal within two weeks of the meeting, Alabama Power told AT&T in unambiguous terms that it was highly unlikely AT&T would receive any kind of new proposal within that time period.[126]

On June 15, 2018, Alabama Power communicated with AT&T regarding a going-forward plan and reiterated its willingness to "continue discussions and to open negotiations concerning

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[122] *See* Ex. A at APC000037-38 (Boyd Declaration ¶ 32).

[123] Ex. A at APC000037-38 (Boyd Declaration ¶ 32).

[124] *See* Ex. A at APC000033 (Boyd Declaration ¶ 19).

[125] *See* Ex. A at APC000033 (Boyd Declaration ¶ 19).

[126] *See* Ex. A at APC000033 (Boyd Declaration ¶ 19).

fundamental changes in our historic relationship."[127] Alabama Power also stated in that June 15, 2018 e-mail: "Please understand that Alabama Power cannot evaluate your request to be treated as an FCC-regulated entity for rate purposes without evaluating an entirely different operating relationship—an evaluation that will take us (and should take AT&T) longer than two weeks to develop."[128] AT&T responded on June 26, 2018 by requesting additional data from Alabama Power and stating: "Federal law entitles AT&T to a reduced rental rate…It need not first renegotiate the entire joint use agreement or develop some new 'operating relationship.'"[129] AT&T was seeking the best of both worlds: it wanted the built-in advantages of the joint use agreement at the price of a pole license agreement. **In other words, AT&T wanted to have its cake, and eat it too**.

Alabama Power nonetheless responded to AT&T with the above-referenced July 19, 2018 letter. This letter (1) provided additional data sought by AT&T, (2) outlined for discussion purposes the advantages in AT&T's joint use agreement as compared to Alabama Power's CATV and CLEC pole license agreements, (3) sought certain limited pieces of data from AT&T to better inform Alabama Power's preparation of a revised cost-sharing proposal, and (4) offered AT&T a reciprocal pole license agreement on a going-forward basis.[130] AT&T waited nearly a month to

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[127] Ex. 12 at APC000474 (Alabama Power June 15, 2018 Email).

[128] Ex. 12 at APC000474 (Alabama Power June 15, 2018 Email).

[129] Ex. 13 at APC000477 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (June 26, 2018) ("AT&T June 26, 2018 Letter").

[130] *See* Ex. 14 at APC000480-84 (Alabama Power July 19, 2018 Letter). AT&T had no interest in a new agreement for new infrastructure so that it could be on par with Alabama Power's CATV and CLEC pole licensees. For AT&T, this was always about a windfall reduction in its cost-sharing responsibilities for the existing joint use network built under the massive advantages of the joint use agreement.

respond to the July 19, 2018 letter, and when it did, it failed to even mention Alabama Power's modest data requests, let alone provide any of the data sought by Alabama Power.[131] Thus, on September 11, 2018, Alabama Power wrote to AT&T: "We are continuing to work on a proposed revised cost-sharing methodology, but as noted in my July 19, letter, it is necessary to first have AT&T's response to our data request."[132] It was January 31, 2019—nearly five months later—that Alabama Power heard **anything** from AT&T. Thus, AT&T's suggestion in the last sentence of paragraph 33 that it was simply waiting for a new cost-sharing proposal for the entire second half of 2018 is not just false—it is a blatant misrepresentation of the nearly five-month period during which AT&T was incommunicado. Alabama Power denies any remaining allegations in paragraph 33.

3. AT&T was incommunicado for the nearly five-month period between September 11, 2018 and January 31, 2019.

34. Alabama Power admits that, on January 31, 2019—after nearly five months of no communication from AT&T—AT&T contacted Alabama Power and asked to resume negotiations. This January 31 contact came in the form of a phone call from Dianne Miller to Pam Boyd.[133] Ms. Miller had recently assumed responsibility for the negotiation after a rapid, unexpected departure by Kyle Hitchcock (the purported previous lead negotiator for AT&T). At that time, Ms. Miller claimed she did not even have copies of the correspondence between the parties from 2018.[134] Alabama Power then sent Ms. Miller copies of the correspondence, and the

[131] *See* Ex. 15 at APC000486-88 (Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (Aug. 16, 2018) ("AT&T Aug. 16, 2018 Letter").

[132] Ex. 16 at APC000490 (Alabama Power Sept. 11, 2018 Letter).

[133] *See* Ex. A at APC000034 (Boyd Declaration ¶ 23).

[134] *See* Ex. A at APC000034 (Boyd Declaration ¶ 23).

parties set a meeting date for February 22, 2019.[135] On February 6, 2019, Ms. Miller and Ms. Boyd spoke again over the telephone.[136] During this call, Ms. Boyd outlined the status of the discussions between the parties and identified the data Alabama Power was still seeking in order to prepare a proposed, revised cost-sharing methodology.[137] Ms. Boyd followed-up with Ms. Miller that same day (February 6, 2019) via email. The e-mail reduced to writing the data that Alabama Power was requesting (in five bullet points) and stated:

> We would like to be in a position to make a firm offer to AT&T prior to the February 22 meeting. In order to do so, we would need this data (or at least the first three bullet points) by the end of this week.[138]

On February 8, 2019, Ms. Miller responded by saying that it did not "desire to provide" the data specifically identified by Alabama Power as necessary to preparation of "a firm offer…prior to the February 22 meeting."[139] On February 13, 2019, Ms. Boyd responded as follows:

> I look forward to meeting you in person, however I do fear that a meeting on the 22nd will not be productive without AT&T's requested cost of pole plant provided in advance. Without this information we will not be able to react to any proposals from your team.[140]

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[135] *See* Ex. A at APC000034-35 (Boyd Declaration ¶¶ 23-24).

[136] *See* Ex. A at APC000035 (Boyd Declaration ¶ 24).

[137] *See* Ex. A at APC000035 (Boyd Declaration ¶ 24).

[138] Ex. 17 at APC000493 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 6, 2019) ("Alabama Power Feb. 6, 2019 Email").

[139] Ex. 18 at APC000496 (AT&T Feb. 8, 2019 Email).

[140] Ex. 19 at APC000500 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 13, 2019) ("Alabama Power Feb. 13, 2019 Email").

On February 15, 2019, in an apparent attempt to gaslight, Ms. Miller responded by saying: "And I trust you will make good on your commitment to provide AT&T an offer at the meeting or beforehand."[141] Ms. Boyd, of course, had never made this commitment. To the contrary, Ms. Boyd had repeatedly told Ms. Miller (as Alabama Power had previously told AT&T in 2018) that it would not provide a revised, proposed cost-sharing methodology without an understanding of AT&T's actual annual pole costs. Thus, on February 21, 2019, Ms. Boyd e-mailed Ms. Miller saying:

> In regards to the **annual pole cost information**, our position still remains that this is a relevant piece of information to Alabama Power in order to negotiate as a joint use partner; therefore we will not be able to provide any offering at the meeting tomorrow. I thought I had made that clear in our last discussion, my apologies if there was any misunderstanding.[142]

Alabama Power admits "it had the information necessary to calculate AT&T's net bare pole cost" and that the calculation of AT&T's net bare pole costs figure is "based on publicly available data" but denies that "net bare pole cost" was the data Alabama Power was seeking from AT&T. The data Alabama Power sought was AT&T's **annual** pole cost calculations—data that is not apparent from AT&T's public filings, insofar as it depends on AT&T's accounting treatment of a variety of different data points. Alabama Power denies any remaining allegations in paragraph 34.

4. AT&T continued to deal with Alabama Power in bad faith.

[141] Ex. 20 at APC000506 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 15, 2019) ("AT&T Feb. 15, 2019 Email").

[142] Ex. 21 at APC000510 (Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 21, 2019) ("Alabama Power Feb. 21, 2019 Email") (emphasis added).

35. At the February 22, 2019 meeting, rather than discussing the principles or particulars of a potential revised cost-sharing methodology, AT&T spent the vast majority of the meeting asking detailed accounting questions about the manner in which Alabama Power calculates annual pole cost under the Commission's formula.[143] AT&T finally disclosed, at this meeting, that its annual pole cost was "approximately" $[redacted]/pole—a figure less than what Alabama Power pays AT&T for each AT&T joint use pole to which Alabama Power is attached.[144] This revelation not only confirmed what Alabama Power had long suspected (that it was grossly overpaying AT&T for access to its poles) but also explained why AT&T—for nearly eight months—refused to provide this incriminating piece of data. There were no offers or demands exchanged at the February 22, 2019 meeting (other than [redacted]).[145] At the end of the meeting, AT&T agreed to reduce its remaining accounting questions to writing so that Alabama Power could provide responses. Alabama Power agreed that, after responding to AT&T's supplemental accounting inquiries, it would provide a proposed revision to the cost-sharing methodology that would involve [redacted].[146]

To the extent the second sentence of paragraph 35 alleges that Alabama Power made **abundantly clear** to AT&T at the February 22, 2019 meeting that Alabama Power would not be

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[143] *See* Ex. A at APC000035 (Boyd Declaration ¶ 26).

[144] *See* Ex. A at APC000035-36 (Boyd Declaration ¶ 26).

[145] *See* Ex. A at APC000036 (Boyd Declaration ¶ 26).

[146] *See* Ex. A at APC000036 (Boyd Declaration ¶ 27).

offering AT&T the new telecom rate for existing joint use poles, Alabama Power admits those allegations. Alabama Power had previously explained at the initial June 1, 2018 meeting, in writing, and again at the February 22, 2019 meeting, the reasons why AT&T was not entitled to the "one-foot" new telecom rate. AT&T nonetheless sought to move forward with the negotiations and, on February 25, 2019, transmitted its written accounting questions, along with other self-serving statements presumably intended to contrive a paper trail of non-facts.[147] On March 15, 2019, Alabama Power sent AT&T written responses to its accounting questions.[148] One week later, on March 22, 2019, Alabama Power transmitted to AT&T a proposed revised cost sharing methodology, along with proposed resolutions of the operational items Alabama Power had raised in the February 22, 2019 meeting. [redacted].[149] Six days later, AT&T responded to Alabama Power's proposal by [redacted]

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[147] *See* Ex. 22 at APC000517-19 (Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 25, 2019) ("AT&T Feb. 25, 2019 Email").

[148] Ex. 23 at APC000521-22 (Email from S. Morgan, Alabama Power, to D. Miller, AT&T (Mar. 15, 2019) ("Alabama Power Mar. 15, 2019 Email").

[149] *See* Ex. 24 at APC000524-25 (Alabama Power March 22, 2019 Settlement Proposal).

[150] *See* Ex. 25 at APC000527-28 (AT&T March 28, 2019 Settlement Proposal).

[redacted]. To say this response was a non-starter is an understatement.[151]

On April 3, 2019, Pam Boyd called Dianne Miller to discuss the status of the negotiations. During that call, Ms. Boyd communicated to Ms. Miller that it would be more conducive to further negotiations if AT&T would address the important operational issues raised by Alabama Power in its March 22, 2019 proposal.[152] Ms. Miller committed that she would communicate with her team and see if they could make an additional offer that addressed some or all of the operational items in the March 22, 2019 proposal.[153] Alabama Power was awaiting Ms. Miller's response when AT&T served the complaint on April 22, 2019.[154]

Alabama Power also denies that AT&T "genuinely lacks the ability to terminate" the joint use agreement and "obtain a new agreement." First, Alabama Power offered to terminate the existing joint use agreement and replace it with a CLEC-style pole license agreement for any new infrastructure. AT&T declined. Second, as it relates to existing joint use poles owned by Alabama Power, AT&T can terminate by simply removing its facilities. AT&T acts as if it is required to remain attached to Alabama Power's pole against its will. Not so. With respect to AT&T's attachments on Alabama Power's poles, it is Alabama Power—not AT&T—that "genuinely lacks the ability to terminate." Alabama Power denies any remaining allegations in paragraph 35.

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[151] The data submitted with AT&T's complaint makes its March 28, 2019 response even more unsettling because it turns out—[redacted] *See e.g.*, AT&T Pole Attachment Complaint, at Ex. B at ATT00053-60 (Affidavit of Diane W. Miller, Apr. 16, 2019, Ex. M-1).

[152] *See* Ex. A at APC000037 (Boyd Declaration ¶ 30).

[153] *See* Ex. A at APC000037 (Boyd Declaration ¶ 30).

[154] *See* Ex. A at APC000037 (Boyd Declaration ¶ 30).

5. AT&T is not entitled to the new telecom rate.

36. For all of the reasons set forth above, Alabama Power denies that AT&T has been entitled to the new telecom rate since the effective date of the 2011 Order. If this were true, AT&T would have raised this at some point prior to March 7, 2018. Alabama Power also denies, for all of the reasons set forth above, that AT&T it entitled to the new telecom rate under the Commission's new ILEC complaint rule.

37. Alabama Power admits that the 2011 Order stands for the proposition that similarly situated attaching entities should pay similar rates, but denies any implication that AT&T is similarly situated to Alabama Power's CATV and CLEC licensees. It never has been, and given the irreversible benefits of incumbency achieved through the joint use agreement, it never will be (at least with respect to existing facilities). Alabama Power also denies, for the reasons set forth herein, that it "has not identified anything that gives AT&T a net material advantage" over Alabama Power's CATV and CLEC licensees. Alabama Power denies any remaining allegations in paragraph 37.

38. Alabama Power denies that it has "ignored those aspects of the JUA that disadvantage AT&T as compared to its competitors" because there are none. The alleged disadvantages (which are buried within the affidavits rather than set forth in the text of AT&T's complaint) are: (1) AT&T's guaranteed position as the lowest attaching entity on a pole; and (2) the fact that AT&T owns poles.[155] With respect to the allegations regarding AT&T's pole position, Alabama Power adopts and incorporates it response to paragraph 20 above. AT&T's allegation

[155] *See* AT&T Pole Attachment Complaint, at Ex. C at ATT00064-66 (Affidavit of Mark Peters, Apr. 16, 2019, ¶¶ 8, 10); AT&T Pole Attachment Complaint, at Ex. D at ATT00083-84 (Affidavit of Christian M. Dippon, Apr. 16, 2019, ¶ 34).

that ownership of poles is a "disadvantage" is ironic given that AT&T claims in the same complaint to be disadvantaged by **not** owning poles.[156] In fact, the alleged disadvantages of **not** owning enough poles was the entire basis for which the Commission's original assertion of jurisdiction over joint use relationships in 2011.[157] And it was the reason the Commission went even further in 2018.[158] Which is it? Is pole ownership an advantage or disadvantage in a joint use relationship? AT&T cannot have it both ways. If pole ownership is indeed a disadvantage, then it is one that inures to AT&T's net benefit. Alabama Power owns 630,000 poles in the jointly used network; AT&T owns 179,000. This means Alabama Power's annual carrying cost for the jointly used network is $[redacted]; AT&T's annual carrying cost is $[redacted].[159] If AT&T actually owned [redacted]% of the jointly used network—which would mean neither party paid the other any meaningful net rentals—then Alabama Power's carrying cost for the remaining [redacted]% of the network would be $[redacted]. There is reason this roughly $[redacted] difference between $[redacted] and $[redacted] corresponds closely to AT&T's net annual rental obligations—it is designed to stand in place of actual pole ownership (i.e. a proxy for pole ownership).[160] Alabama Power denies any remaining allegations in paragraph 38.

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[156] *See e.g.*, AT&T Pole Attachment Complaint, at ¶ 30.

[157] *2011 Order*, ¶¶ 199, 206.

[158] *2018 Order*, ¶¶ 125, 126.

[159] These figures are based on annual pole costs as calculated under Appendix B based on year end 2017 data. Under the annual pole cost as calculated under the CATV/CLEC rate methodology, these figures would be $[redacted] and $[redacted] respectively.

[160] *See* Ex. 1 at APC000305 (JUA, p. 1). ("[W]hen the parties are making arrangements for the joint use of new poles…the parties shall take into consideration the desirability of having the new poles owned by the party owning the lesser number of joint use poles so as to progress toward a division of ownership of poles so that neither party shall be required to pay annual rental payments….".

39. Alabama Power admits that the joint use agreement, in contrast to Alabama Power's CATV and CLEC pole license agreements, reflects a "decades-old contractual responsibility" for AT&T to share in the cost of jointly used poles. Alabama Power further admits that AT&T still owns many jointly used poles today. AT&T currently owns approximately 179,000 poles jointly used with Alabama Power. These were reasons identified in the 2011 Order for **not** treating ILECs the same as CATV and CLEC licensees.[161] In fact, in the sentence of the 2011 Order immediately following the sentence quoted by AT&T, the Commission stated:

> A failure to weigh, and account for, the different rights and responsibilities in joint use agreements could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators.[162]

Similarly, in the same part of the 2011 Order, the Commission stated:

> Although some incumbent LECs express concerns about existing joint use agreements, these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable.[163]

Alabama Power also admits that the costs of owning and maintaining joint use poles are substantial and growing. Given that Alabama Power owns 78% of the poles in the jointly used network, AT&T should be paying more—not less—towards those costs. How in the world does it make any sense that, as Alabama Power's carrying cost of the joint use network increases,

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[161] *2011 Order*, 26 FCC Rcd 5240, 5335 (¶ 216, n.654).

[162] *Id*.

[163] *2011 Order*, ¶ 216.

AT&T's contribution towards those costs should decrease? This notion, advanced by AT&T here, is fundamentally backward. Alabama Power denies any remaining allegations in paragraph 39.

C. AT&T Should Continue to Share in the Cost of the Jointly Used Network as Set Forth in Appendix B to the Joint Use Agreement.

40. Alabama Power denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis. As set forth above, Alabama Power already has offered AT&T the new telecom rate under a pole license agreement that would cover poles that are not already in joint use. AT&T declined. Nonetheless, AT&T's calculations of Alabama Power's CATV and CLEC pole attachment rates for the period 2011-2017 are inaccurate. The proper per foot calculations applicable to Alabama Power's CATV and CLEC pole licensees are as follows:

	2011	2012	2013	2014	2015	2016	2017
CATV	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
CLEC	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

These rates were calculated using the formulas set forth in Exhibit A to Alabama Power's CATV and CLEC pole license agreements. More importantly, though, AT&T does not occupy one-foot of space. As set forth above, AT&T actually occupies [redacted] feet of space and AT&T is the cost-causer of 3.33 feet of additional space on Alabama Power's poles. If these per foot rates were applied to AT&T based on its occupancy levels (rounding down to [redacted] feet), it would yield rates for the corresponding periods as follows:

	2011	2012	2013	2014	2015	2016	2017
CLEC Rate	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Alabama Power denies any remaining allegations in paragraph 40.

41. Alabama Power denies that it "refused AT&T's repeated requests for the rates and their supporting calculations." On June 15, 2018, Alabama Power provided its template CATV and CLEC pole license agreement.[164] Exhibit A to the template lays-out in detail (including but not limited to reference to FERC accounts) exactly how the CATV and CLEC rates are calculated.[165] Then, on July 19, 2018, Alabama Power provided its then-current annual pole cost so that AT&T could perform whatever calculations it wanted to perform based on various space occupancy scenarios under the CATV rate, the old telecom rate or the new telecom rate.[166] Alabama Power denies that it "improperly inflates it new telecom rates." The modifications and clarifications to the annual rate formula in Alabama Power's CATV and CLEC pole license agreements—including but not limited to the modification/clarification with respect to overhead grounds—were the product of a lengthy negotiation between Alabama Power and the Alabama Cable Telecommunications Association that concluded in or around 2006.[167] AT&T also misunderstands the Commission's precedent with respect to the inclusion of overhead grounds in the annual pole cost. In the order cited by AT&T, the Commission stated:

> We affirm our conclusion that lightning protectors and grounding installations recorded in accounts other than Account 364 should not be included in the calculation of the net cost of a bare pole factor. Attaching entities are required to provide separate grounding for their own attachments.[168]

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[164] *See* Ex. 12 at APC000473 (Alabama Power June 15, 2018 Email).

[165] *See* Ex. 7 at APC000454-55 (Alabama Power Template CLEC Agreement).

[166] *See* Ex. 14 at APC000480 (Alabama Power July 19, 2018 Letter).

[167] Ex. B at APC000057 (Conwell Declaration ¶ 5).

[168] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6475 (2000).

Alabama Power does not include grounding costs in Account 364, and its CATV and CLEC pole licensees do not provide separate grounding systems. Thus, the authority cited by AT&T is at worst inapplicable—at best, it supports the approach negotiated between Alabama Power and the Alabama Cable Television Association. Perhaps more importantly, the rate actually invoiced and paid by Alabama Power's CATV and CLEC licensees includes a portion of investment in overhead grounds. AT&T cannot say, on the one hand, "we are entitled to the same per foot rate paid by Alabama Power's CATV and CLEC licensees," but then on the other hand claim that it should receive a more favorable per foot rate. Alabama Power denies any remaining allegations in paragraph 41.

42. Alabama Power denies the allegations in the first sentence of paragraph 42. The Commission should instead find that the cost-sharing provisions of the existing joint use agreement—which AT&T first questioned in March 2018—are just and reasonable. Further, the Commission need not entertain AT&T's gratuitous request to vindicate the alleged rights of Alabama Power's CATV and CLEC pole licensees (none of whom have taken exception to Exhibit A in Alabama Power's CATV and CLEC pole license agreements). Alabama Power denies that the Commission should order a refund of any amounts to AT&T. The facts of this case clearly demonstrate that the cost-sharing provisions in the existing joint use agreement are just and reasonable—if not favorable to AT&T. But in any event, as set forth above, <u>**AT&T did not even question the parties' cost-sharing arrangement until March 7, 2018**</u>. Given this fact alone, AT&T should be estopped from claiming or obtaining any sort of refund prior to the 2018 billing year. The Commission stated in its 2018 Order:

> Because our intention is to encourage broadband deployment going forward, we decline to adopt USTelecom's proposal that we give incumbent LECs "the right to refunds for overpayment as far back as the statute of limitations allows."[169]

Moreover, the period for which AT&T seeks a refund is a period of time governed by the Commission's old ILEC complaint rule. Under the old rule, AT&T—not Alabama Power—bears the burden of proof.[170] AT&T has fallen woefully short of its burden.[171]

Further, AT&T's complaint seems to presume that the "applicable statute of limitations" is the six-year statute of limitations in Alabama Code § 6-2-34 for breach of contract. The Commission, though, has never explained what is meant by the "applicable statute of limitations" for purposes of Rule 1.1407(a)(3). Given that AT&T's complaint most certainly is **<u>not</u>** a breach of contract action, and given that AT&T's claim most certainly does **<u>not</u>** sound in Alabama law, it

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[169] *2018 Order*, ¶ 127 n.478.

[170] *See* 47 C.F.R. § 1.1424 ("In complaint proceedings where an [ILEC] claims that is it similarly situated to an attacher that is a telecommunications carrier…or a cable television system…the [ILEC] shall bear the burden of demonstrating that is it similarly situated by reference to any relevant evidence, including pole attachment agreements."), *redesignated* as 47 C.F.R. § 1.1413.

[171] AT&T offer absolutely no economic analysis to support its complaint, either with respect to the period preceding the effective date of the Commission's new ILEC complaint rule or thereafter. AT&T's "evidence" regarding the net material advantages of the joint use agreement is best described as "conclusory." *See* AT&T Pole Attachment Complaint, at Ex. B at ATT00043 (Affidavit of Diane W. Miller, Apr. 16, 2019, ¶ 22) ("it is my opinion that Alabama Power has not identified any net operational benefit that gives AT&T a material advantage over its cable and CLEC competitors…."); AT&T Pole Attachment Complaint, at Ex. C at ATT00062 (Affidavit of Mark Peters, Apr. 16, 2019, ¶ 11) ("it is my opinion that Alabama Power has not identified any net benefit that gives AT&T a material advantage over its cable and CLEC competitors…."); AT&T Pole Attachment Complaint, at Ex. D at ATT00068 (Affidavit of Christian M. Dippon, Apr. 16, 2019, ¶ 33) ("It is my opinion that Alabama Power has not identified any net benefits that provide AT&T a material advantage under the principles of competitive neutrality."); *see also, e.g*, *Verizon Florida LLC v. Florida Power & Light Co*., 30 FCC Rcd 1140, 1140-41 (2015) (dismissing ILEC complaint under old rule where ILEC made "no attempt to estimate the value of those unique benefits").

would not make sense to apply Alabama's breach of contract statute of limitations.[172] A more appropriate statute of limitations, if this concept has any relevance at all to this proceeding, would be the two-year statute of limitations in 47 U.S.C. § 415.[173]

43. Alabama Power denies that the amounts it collected from AT&T since 2011 were "collected in violation of federal law." If this were the case, AT&T would have mentioned this before March 7, 2018. Alabama Power further denies that a refund would be "consistent with the Commission's intention." In fact, as set forth above in paragraph 42, a refund would be specifically contrary to the Commission's intention. It is also bizarre that AT&T would allege, as it does in the third sentence of paragraph 43, that a failure to award a refund "discourages pre-complaint negotiations between the parties." Here, it is not as if AT&T raised a dispute about the cost-sharing provisions in the existing joint use agreement in 2011 but waited until 2019 to file its complaint—AT&T never even mentioned (let alone raised) a dispute regarding the cost sharing provision until March 7, 2018. So there were not any "pre-complaint negotiations" to be had

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[172] AT&T cites the *Verizon Virginia* decision as supporting the application of a breach of contract statute of limitations, but this is not what *Verizon Virginia* says. *See* AT&T Pole Attachment Complaint, at ¶ 42 n.122. Importantly, the Commission made no finding regarding the "applicable statute of limitations" in that case. The Commission merely noted that Verizon contended that the applicable statute of limitations was a 5-year breach of contract limitations period and that the defendant in that case did not dispute that contention. *See Verizon Virginia, LLC and Verizon South, Inc., v. Virginia Electric and Power Company d/b/a Dominion Virginia Power,* 32 FCC Rcd 3750, 3764 (2017).

[173] *See e.g., American Cellular Corporation and Dobson Cellular Systems, Inc. v. BellSouth Telecommunications, Inc.*, 22 FCC Rcd 1083, 1083 (2007) (dismissing complaint filed under Section 208 for alleged over-billing as time barred under Section 415's two-year statute of limitations); *Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative v. American Telephone and Telegraph Company and MCI Telecommunications Corporation*, 12 FCC Rcd 2611, 2623 (1997) (denying applications for review and finding the Common Carrier Bureau properly dismissed complaints filed pursuant to Section 208 as time-barred by Section 415's two-year statute of limitations); *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. ALASCOM, Inc.*, 4 FCC Rcd 2472, 2477 (1989) (dismissing claims filed pursuant to Section 208 as time-barred under Section 415's two-year statute of limitations).

between the parties prior to March 7, 2018. In any event, if there is anything unjust or unreasonable about the existing cost-sharing arrangement between Alabama Power and AT&T, it is that Alabama Power is paying AT&T more per pole on an annual basis than AT&T's entire annual pole cost.

Even if AT&T were paying for its pole space on a per foot basis like Alabama Power's CATV and CLEC licensees, those amounts would have been higher than the annual rates as calculated under Appendix B. Further, the notion that Alabama Power was the cause of some sort of delay in the negotiations after AT&T first raised a dispute on March 7, 2018 is demonstrably false. First, AT&T refused to provide any data at all to assist Alabama Power in evaluating AT&T's request. Second, and as set forth above in paragraph 33, AT&T was incommunicado from September 11, 2018 through January 31, 2019—nearly five months (almost 40%) of the thirteen-month time period from when AT&T first disputed the cost-sharing provisions in Appendix B until filing its complaint. Alabama Power denies any remaining allegations in paragraph 43.

IV. COUNT I—THE COMMISSION SHOULD REFRAIN FROM DISTURBING THE APPENDIX B COST-SHARING METHODOLOGY.

44. Alabama Power adopts and incorporates paragraphs 1 through 43 as it fully set forth herein.

45. Alabama Power denies that the Commission is "statutorily required to ensure that the pole attachment rates that Alabama Power charges AT&T are just and reasonable." In fact, until 2011, the Commission interpreted the Act as **prohibiting** the regulation of the rates, terms and conditions of ILEC attachments on electric utility poles.[174] In other words, even if the

[174] In an early rulemaking implementing the 1996 Act, the Commission noted: "…an ILEC has no rights under Section 224 with respect to the poles of other utilities." *Implementation of Section*

Commission's current interpretation of the statute is permissible, the Commission most certainly is not "statutorily required" to regulate this relationship. Further, to the extent there is a statutory "requirement" to regulate the joint use network cost-sharing relationship between Alabama Power and AT&T, the Commission should forbear from exercising such authority under 47 USC § 160(a).[175] Even if the Commission is reluctant to forbear in this case, it should still, pursuant to Rule 1.3, suspend or waive the applicability of Rule 1.1413 (and its predecessor rule) given the facts of this particular case.[176]

46. Alabama Power denies that the cost-sharing provisions of the joint use agreement are unjust, unreasonable or otherwise in violation of the Pole Attachments Act. To the contrary, the cost-sharing provisions are just, reasonable and consistent with what AT&T's internal strategy documents indicate is the "most equitable" method of sharing costs in a joint use network.[177] Moreover, as set forth above, even if AT&T were afforded a "per foot" rate consistent with

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703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777, 6781 (1998); *see also, 2011 Order*, 26 FCC Rcd 5240, 5328 (¶ 205).

[175] *See* 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.").

[176] 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[177] *See* ¶¶ 33, 38, *supra*.

Alabama Power's CATV and CLEC licensees, it would yield a rate higher than the rates yielded by Appendix B.

47. The just and reasonable rate for AT&T's attachments to Alabama Power's poles is the rate calculated in accordance with Appendix B to the joint use agreement. But in the event the Commission applies the new telecom rate to AT&T's attachments to Alabama Power's poles, it should be applied on a per foot basis in order to avoid discriminating against Alabama Power's CATV pole licensees. Based on the data set forth above regarding AT&T's actual occupancy levels and the new telecom rates charged to Alabama Power's CLEC licensees for one foot of pole space, the following per pole rates would apply to AT&T for years 2012 through 2017:

2012	2013	2014	2015	2016	2017
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Under this approach, AT&T would have paid significantly more in net rentals than it actually paid during the same period. Alabama Power denies that AT&T is entitled to any sort of refund, denies that it charged AT&T unjust or unreasonable rates at any time during the 2012-17 time period, and denies any remaining allegations in paragraph 47.

48. As explained above, the pre-existing telecom rate formula cannot serve as a "cap" on the rate for existing joint use poles owned by Alabama Power because this "cap" (if it applies at all) applies only to agreements "entered into or renewed" after March 11, 2019. **Because Alabama Power lacks the ability to terminate the agreement with respect to existing joint use poles (even in the event of a default), the agreement cannot "renew" with respect to those poles**. AT&T, in essence, has a unilateral perpetual license option on 630,000 joint use poles owned by Alabama Power. But even if the pre-existing telecom rate formula is a "cap" it would yield the following rates based on the same assumptions used in paragraph 47 above:

	2012	2013	2014	2015	2016	2017
AT&T on Alabama Power poles	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Alabama Power on AT&T poles[178]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Under this approach, AT&T would have been required to pay $[redacted] more in net rentals than it actually paid during the same period.[179] Alabama Power denies that AT&T is entitled to any sort of refund and denies any remaining allegations in paragraph 48.

V. AT&T'S COMPLAINT SHOULD BE DENIED

49. The Commission should deny AT&T's request "that the Commission find that Alabama Power charged and continues to charge AT&T unjust and unreasonable rates in violation of federal law." As set forth above, the cost-sharing provisions in the existing joint use agreement not only are just and reasonable, but also are consistent with AT&T's own internal strategy documents identifying the "most equitable" means of allocating the costs of a joint use network.

50-51. The Commission should deny AT&T's request that the Commission establish different rates for the 2012-17 time period especially given that AT&T never even voiced an objection to the Appendix B cost-sharing methodology until March 7, 2018. But in the event the Commission unwinds the cost-sharing provisions of the joint use agreement, any alternative rates that it sets should be consistent with the rates set forth in paragraphs 47 or 48 above.

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[178] The figures in this row presume the accuracy of AT&T's calculation of the "proportional" pre-existing telecom rate that Alabama Power would have paid on AT&T poles (which are based on [redacted] feet of space and includes the safety space in Alabama Power's space allocation given that Alabama Power is the licensee of AT&T's poles). *See* AT&T Pole Attachment Complaint, at ¶ 48, Ex. A at Bates No. ATT00011 (Affidavit of Daniel P. Rhinehart (April 16, 2019) ¶ 21).

[179] *See* Ex. B at APC000060 (Conwell Declaration ¶ 15).

52. The Commission should deny AT&T's request for a refund in this case for the period 2012-17 not only because the cost-sharing provisions in the existing joint use agreement are just and reasonable but also because AT&T never voiced an objection to those cost-sharing provisions until March 7, 2018.

In addition to denying the relief sought by AT&T, the Commission should also award to Alabama Power such relief as the Commission deems necessary, just and reasonable.

AFFIRMATIVE DEFENSES

Alabama Power, in accordance with Rule 1.1726(e), adopts and incorporates the facts set forth above and separately pleads the following affirmative defenses:

1. AT&T is estopped from seeking a refund for periods that precede March 7, 2018, which is the date AT&T first provided notice to Alabama Power that it disputed the cost-sharing methodology provisions of the joint use agreement.

2. AT&T's complaint should be dismissed for failure to comply with the good-faith negotiation requirement set forth in Rule 1.722(g).

3. AT&T's claim for relief under the Commission's new ILEC complaint rule fails to state a claim upon which relief can be granted because the joint use agreement at issue was not "entered into or renewed" after the effective date of the rule.

4. AT&T's complaint should be dismissed because the contract between the parties contains a mandatory arbitration provision applicable to "controversies and disputes which may arise in connection with the joint use of poles" including "any differences which are not covered by the terms" of the joint use agreement.

5. The Commission should forbear from exercising jurisdiction in this case because the facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case.

6. Pursuant to Rule 1.3, the Commission should waive the applicability of Rule 1.1413 and its predecessor rule.

7. The rule upon which AT&T's complaint is premised is unlawful, ultra vires, arbitrary, capricious and unreasonable.

8. The applicable statute of limitations bars some or all of AT&T's claim.

Dated: June 21, 2019

Respectfully submitted,

/s/ Eric B. Langley
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Attorneys for Defendant
Alabama Power Company

INFORMATION DESIGNATION

1. The Alabama Power employees and outside experts with relevant information about this proceeding and rental rate dispute are identified in this answer and its supporting declarations, affidavits, and exhibits.

2. The joint use agreement, exemplar pole license agreements, and correspondence between the parties are attached as exhibits to this answer. Also attached are declarations and affidavits of Alabama Power employees and third-party experts. Additional information and documents were filed and served on May 22, 2019 with Alabama Power's Response to AT&T's First Set of Interrogatories. Additionally, Alabama Power is seeking information from AT&T via interrogatories that are being served concurrently with this answer. Alabama Power reserves the right to rely on information that is not included or attached to this answer if it is provided by AT&T or becomes relevant.

RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, verify that I have read the foregoing submission and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2019, a true and correct copy of the Public Version of Alabama Power Company's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint was filed with the Commission via ECFS (Confidential Version filed via hard copy) and was served on the following (service method indicated):

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Gary Phillips
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/s/ Eric B. Langley
OF COUNSEL

PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T ALABAMA,	)	
Complainant,	)	
v.	)	**Proceeding No.: 19-119**
	)	**Bureau ID No.: EB-19-MD-002**
ALABAMA POWER COMPANY,	)	
Defendant.	)	

Declarations and Affidavits

A. Declaration of Pamela O. Boyd (June 20, 2019)

B. Declaration of Wesley L. Conwell, Jr. (June 20, 2019)

C. Declaration of Sherri T. Morgan (June 20, 2019)

D. Affidavit of Kenneth P. Metcalfe (June 20, 2019)

E. Declaration of Wilfred Arnett (June 19, 2019)

Exhibits

1. Joint Use Agreement Between Alabama Power Company and South Central Bell Telephone Company ("AT&T"), dated June 1, 1978 ("JUA").

2. JUA, Appendix B dated June 1, 1978.

3. JUA, Appendix B dated January 1, 1984.

4. JUA, Appendix B dated January 1, 1990.

5. Alabama Power CLEC Pole License Agreement, effective March 7, 2018.

6. Alabama Power CATV Pole License Agreement, effective May 24, 2017.
7. Alabama Power Template CLEC Agreement.
8. ILEC Service Area Map
9. Letter from K. Hitchcock, AT&T, to D. Bynum, Alabama Power (Mar. 7, 2018).
10. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (April 4, 2018).
11. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (April 13, 2018).
12. Email from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (June 15, 2018).
13. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (June 26, 2018).
14. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (July 19, 2018).
15. Letter from K. Hitchcock, AT&T, to S. Morgan, Alabama Power (Aug. 16, 2018).
16. Letter from S. Morgan, Alabama Power, to K. Hitchcock, AT&T (Sept. 11, 2018).
17. Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 6, 2019).
18. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 8, 2019).
19. Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 13, 2019).
20. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 15, 2019).
21. Email from P. Boyd, Alabama Power, to D. Miller, AT&T (Feb. 21, 2019).
22. Email from D. Miller, AT&T, to P. Boyd, Alabama Power (Feb. 25, 2019).
23. Email from S. Morgan, Alabama Power, to D. Miller, AT&T (Mar. 15, 2019).
24. Alabama Power March 22, 2019 Settlement Proposal
25. AT&T March 28, 2019 Settlement Proposal